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Supreme Court, U. S.
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APPENDIX

In The

Supreme Court of the United States

October Term, 1971

No. 71-364

JOAN S. MAHAN, ET AL., *Appellants,* v. HENRY E. HOWELL, JR., ET AL., *Appellees.*

EDGAR A. PRICHARD, ET AL., *Appellants,* v. CLIVE L. DUVAL, II, ET AL., *Appellees.*

EDGAR A. PRICHARD, ET AL., *Appellants,* v. STANFORD E. PARRIS, ET AL., *Appellees.*

No. 71-373

CITY OF VIRGINIA BEACH, *Appellant,* v. HENRY E. HOWELL, JR., ET AL., *Appellees.*

CITY OF VIRGINIA BEACH, *Appellant,* v. STANFORD E. PARRIS, ET AL., *Appellees.*

CITY OF VIRGINIA BEACH, *Appellant,* v. CLIVE L. DUVAL, II, ET AL., *Appellees.*

No. 71-553

Appellants, v. EDGAR A. PRICHARD, ET AL., *Appellees.*
WILLIAM S. THORNTON, ET AL.,

Appeal from the United States District Court
for the Eastern District of Virginia

PRELIMINARY STATEMENT

The three appeals in which probable jurisdiction has been noted, arise from the 1971 Virginia reapportionment acts redistricting the State legislative seats in both the Senate and House of Delegates of the General Assembly of Virginia. The cases below were styled as follows: Howell, et al. v. Mahan, et al.; DuVal, et al. v. Prichard, et al.; Parris, et al. v. Prichard, et al. The *Howell* case attacks Senate reapportionment and the *DuVal* and *Parris* cases attack the House of Delegates legislative reapportionment.

The City of Virginia Beach and William S. Thornton, appellants in the other cases granted an appeal, (Nos. 71-373, 71-553) were intervenors below on behalf of defendants (Virginia State Board of Elections) and plaintiffs respectively.

The instant Appendix is divided into three parts relating to the (1) House redistricting (2) Senate redistricting and (3) Voting Rights Act aspects as raised in the *Thornton* appeal.

Material formerly submitted in the "Joint Appendix of the City of Virginia Beach and Virginia State Board of Elections—Joan S. Mahan, et al." filed with the Jurisdictional Statements is not again being reproduced but is incorporated herein by reference and the table of contents set forth as follows:

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ANTHONY F. TROY
Assistant Attorney General

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HOUSE OF DELEGATES REDISTRICTING

EDGAR A. PRICHARD, MEMBER,

STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

CLIVE L. DUVAL, 2D. ET AL.,
Appellees.

EDGAR A. PRICHARD, MEMBER,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

STANFORD E. PARRIS, ET AL.,
Appellees.

DOCKET ENTRIES

No. 71-364

1971

Mar. 22—Complaint, prayer for a three-judge court, and motion for temporary restraining order—filed.

Mar. 22—Summons issued and given to Marshal for service.

Mar. 29—Notification and Request for designation of Three-Judge Court—filed.

Mar. 29—Designation of Three-Judge Court filed and the Judges designated to hear the case are Honorable Albert V. Bryan, United States Circuit Judge, Fourth Judicial

1971

Circuit, and Honorable Robert R. Merhige, Jr. United States District Judge for the Eastern District of Virginia and Honorable Oren R. Lewis.

Mar. 29—Marshal's return on summons executed as to all defts.—filed.

Apr. 2—Answer filed by defts. Edgar A. Prichard, Joan S. Mahan, Ulysses P. Joyner, Jr., A. Linwood Holton & Andrew P. Miller. Copies to 3 judges.

Apr. 8—Petition of the City of Norfolk to intervene as a party defendant—filed.

Apr. 8—Affidavit supporting the City of Norfolk's petition for leave to intervene—filed.

Apr. 8—Notice re motion to intervene returnable 4-15-71 —filed.

Apr. 12—Copy of order entered by Judge Merhige consolidating this cause with Civ. 174-71 (Richmond Div.) and setting cases for trial in Richmond on 5-24-71—received. Order entered April 7, 1971.

Apr. 13—Order consolidating this action with Richmond case No. 174-71-R; setting May 24, 1971 as date of trial, etc., ent. and filed—copies to all counsel of record in each case & designated judges.

Apr. 16—Notice of taking depositions of Wm. H. Stanhagen, Millard C. Rappleyea and Carol Griffee—filed by plf.

Apr. 16—Answer of the intervenor, City of Norfolk, filed April 13, 1971.

Apr. 21—Copy of notice of taking depositions of Stanford E. Parris and Edmund D. Campbell—filed by defts.

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Apr. 23—Agreed to stipulation by all parties of G. Robt. House, Jr., City Manager of the City of Norfolk—filed.

Apr. 23—Copies of exhibits on behalf of the intervenor, City of Norfolk—received and filed.

Apr. 27—Petition for leave to intervene—filed by City of Va. Beach, Va.

Apr. 27—Notice of motion returnable 4-28-71 in Richmond in re petition of City of Va. Beach, Va. to intervene as a party deft.—filed.

Apr. 27—Exhibit marked "Intervenor's (City of Norfolk) Exhibit No. 1 in Deposition of Robt. Griffis—received.

Apr. 28—Order allowing City of Virginia Beach, Va. to intervene as a party defendant and directing that such intervention shall not serve to enlarge or extend any discovery cut-off dates or hearing date heretofore established—ent. by Judge Merhige & filed—copies to all counsel of record and to designated judges.

May 3—Affidavit supporting the City of Virginia Beach's petition to intervene—filed.

May 5—Testimony (copy) of James M. Thomson—filed.

May 13—Memorandum (J. Merhige)—filed.

May 13—Order in accordance with memorandum directing parties to file within seven days of date herein such memoranda as they deem appropriate & requesting the U.S. to file memorandum amicus curiae, etc., ent. and filed.

May 14—Brief of the Intervenor, City of Norfolk—filed.

May 17—Brief on behalf of the intervenor, City of Virginia Beach—filed.

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May 17—Brief on behalf of the Commonwealth—filed.

May 18—Brief on behalf of plaintiffs—filed.

May 20—Depositions of Wm. H. Stanhagen & Millard C. Rappleyla, Sr. & Carol Griffee—received.

May 21—Copy of Intervenor's, City of Norfolk, Findings of fact and Conclusions of Law—filed.

May 21—Memorandum of the Intervenor, City of Norfolk —filed.

May 21—Memorandum on behalf of the Commonwealth—filed.

May 24—Trial Proceedings: (in Richmond—Judges Lewis, Bryan and Merhige) Appearances: Parties with counsel. Oral argument heard. Order handed down by panel as follows: (a) Trial of this suit is continued. (b) Primary election of State of Va. set for June 8 is postponed until Sept. 14, 1971. (c) That unless Va. adopts reapportionment legislation on or before June 14, 1971, this court shall proceed with the trial of this suit and thereafter formulate a plan of reapportionment within prescription of Voting Rights Act. (d) Court retains jurisdiction of case until further order.

May 24—Order on hearing ent. and filed.

June 2—Affidavit (copy) of Leslie C. Curdts, General Registrar of the City of Norfolk, filed.

June 16—Trial Proceedings: (in Richmond—Judges Lewis, Bryan and Merhige) Parties appeared by counsel. Case argued.

July 2—Opinion—filed.

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July 2—Interlocutory order implementing findings of fact and conclusions of law stated in opinion—entered and filed.

July 13—Notice of appeal filed by defts., Joan S. Maham, U. P. Joyner, Jr. and Edgar A. Prichard, Members, Va. State Board of Elections, (defts. Linwood Holton, Governor of Virginia, & Andrew P. Miller, Atty. Gen. of Va. having been deleted as party defts.) from interlocutory order of 7-2-71.

July 13—Motion for stay of judgment pending appeal filed by deft. (above named.)

July 14—In Open Court: Lewis, J. Appearances: Parties and by counsel. Defts'. motion for stay of order of this Court dated July 2, 1971, argued. Motion denied. Order denying stay entered—filed, in open court. Copies sent.

Aug. 2—Notice of appeal (cross) filed by pltfs. Copies sent.

Aug. 3—Undertaking for costs (appeal) in amt. of $250 filed by pltfs.

DOCKET ENTRIES

No. 71-373

1971

March 8—Complaint filed March 5, 1971, and summons issued March 8, 1971. MLS

March 10—Order notifying and requesting Judge Haynsworth to designate two judges to form a three-judge court in action; ent 3-10-71 and filed. Copy certified to Judge Haynsworth and counsel of record. (LG)

March 15—Designation for Three-Judge Court; Albert V. Bryan and John A. MacKenzie to sit with Robert R. Merhige, Jr., rec'd and filed. MLS

March 16—Petition to intervene rec'd from James Thompson. pv

March 16—In Open Court: Merhige, J. Appearances: Parties and by counsel. Pre-trial conference held. Tentative dates set: Opening Briefs by: Pltf: 5-3-71 Deft: 5-14-71. Pltf's rply: 5-19-71. Exhibits to be filed with clerk at Richmond by 4-27-71. Plaintiff's reply to deft's answers to be filed within 7 days after filing of answers. Trial date set for May 24, 1971. Copies of all pleadings to be sent to all counsel, and each judge. Cut off on discovery: Plaintiff: 4-17-71. Deft: 4-27-71.

March 17—Marshal's return on summons as to all defendants listed. JP

March 17—Pre-trial Order entered, filed. Copies mailed all counsel of record. pv.

March 25—Plaintiff's Exhibit No. 2 Filed. LG

1971

March 29—Petition for leave to intervene with supporting affidavit, filed by proposed intervenor, City of Norfolk. LG

March 29—Notice of motion to intervene for 4-14-71, 9:45 A.M., filed by City of Norfolk. LG

March 29—Answer of City of Norfolk to intervening petition of Thomson, filed. LG

March 29—Answer of City of Norfolk to plaintiffs' complaint, filed. LG

April 1—Answer of defts Rappleyea, Short & Jasper rec'd, filed, pv.

April 2—Motion to consolidate this case with C. A. 111-71-Alex., Parris et al. v. Prichard et al., filed by deft. members of State Board of Elections. MLS

April 2—Answer of defts. Prichard, Mahan, Joyner, Holton and Miller, filed MLS

April 7—Order consolidating Civil Action No. 111-71-A, Stanford v. Parris, et al. with this case for trial, entered, filed. Copies mailed counsel of record. pv.

April 7—Order filing petitions to intervene, with leave to all parties to file within 15 days any replies deemed necessary, entered, filed, pv. Copies mailed all counsel of record. pv.

April 7—Intervening petition of James M. Thomson, filed. PPV

April 16—Notice to take depositions of Dr. Conrad E. Tarbeau filed by defts. MLS

April 21—Notice to Take de bene esse deposition of R. J. Griffis, 4-23-71, filed defts— G

1971

April 23—Answer to Intervening Petition, filed by defts. (LG)

April 23—Copy of Exhibits on behalf of intervenor, City of Norfolk, filed. (LG)

April 23—Stipulation by all parties of G. Robert House, Jr., City Manager of City of Norfolk, filed. (LG)

April 27—Petition for leave to intervene filed by City of Virginia Beach. MLS

April 27—Notice of motion to be allowed to intervene filed by City of Va. Beach, MLS

April 27—Exhibit marked "Intervenor's (City of Norfolk) Exhibit No. 1 in Depositions of Robert Griffis" rec'd from Assistant City Atty Tayloe of Norfolk. MLS

April 28—Depositions taken 4-8-71 of Lindberg, et al., recd. and filed on behalf of pltfs. (LG)

April 28—Order allowing City of Virginia Beach be made a defendant and to file pleadings; ent. 4-28-71 & filed. Copies mailed counsed and Judges. (LG)

April 28—Exhibits Nos. 1 through 7, filed by defts. No. 8 to be forwarded. (LG)

April 29—Exhibits 1-30 filed by plaintiff. pv

May 3—Affidavit supporting the City of Virginia Beach's Petition to Intervene, filed. MLS

May 3—Plaintiff's trial brief rec'd, filed. pv.

May 5—Deft's Exhibit No. 8 filed. (LG)

May 10—DeBenne Esse deposition of Robert J. Griffis rec'd. pv

1971

May 10—Deposition of Dr. Conrad F. Taeuber rec'd. pv.

May 13—Memorandum of the court filed.

May 13—Order directing each of the parties hereto to file within seven days of this date such memoranda as they deem appropriate concerning the matters referred to in above memorandum; requesting the United States to file such memorandum as amicus curiae, ent. 5-13-71. Copies mailed counsel of record. MLS

May 14—Brief, Title of Citations, and Preliminary Statement, filed by City of Norolk. MLS

May 14—Brief on Behalf of Intervenor City of Virginia Beach, filed.

May 17—Deposition of Robert B. Voight rec'd. pv.

May 14—Brief on Behalf of the Commonwealth of Va., filed. LG copies mailed to Alex. & Norfolk Clerk's Offices for their files.

May 17—Petition for Leave to Intervene, filed by atty. for W. S. Thornton, P. Howlette, J. M. Brooks, E. L. Slade & A. Brown. (LG)

May 18—Order that William S. Thornton et al be allowed to intervene in this cause; filing complaint in intervention; granting said plf. intervenors leave to file on or before May 21, 1971, such stipulations, exhibits and other documentary evidence going to the issues raised in their complaint; and shall file such memorandum in support of their proposed Findings of Fact and Conclusions of Law on or before May 20, 1971; all other parties are granted leave to file such responsive pleadings to the complaint as they deem appropriate on or before 5 P.M., May 21, 1971, ent. 5-18-71. Copies mailed counsel of record. MLS

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May 18—Complaint in Intervention filed. MLS

May 18—Notice of Motion to intervene filed by attorney for Lewis A. McMurran, Jr., Alan A. Diamonstein and T. V. Morrison, Jr.

May 18—Motion to intervene filed by Lewis A. McMurran, Jr., et al. MLS

May 18—Index to Defts' Exhibits filed. MLS

May 19—Depositions of Van Meter, Prichard, Leigh, Harris, Abramson, Bergheim, Miller, DuVall, Alexander, Stanhagen, Rappley & Griffis rec'd on behalf of pltfs. pv

May 20—Findings of Fact and Conclusions of Law, filed by Intervenor, City of Norfolk. LG

May 20—Memorandum of the Intervenor, City of Norfolk, filed. LG

May 20—Plaintiff-Intervenors' Response to the Court's Questions Concerning Section 5 of the Voting Rights Act, filed. JP

May 20—Plaintiffs' Proposed Findings of Fact, filed. LG

May 20 Special Memorandum in response to court order of 5-13-71, filed by plaintiffs. LG

May 20—Proposed Findings of Fact and Conclusions of Law filed by plaintiff-intervenors. MLS

May 21—Volume II of Exhibits Submitted on Behalf of Plfs. filed by plfs. MLS

May 21—Reply Brief on behalf of plaintiffs, filed. MLS

May 21—Memorandum of Law in Support of Black Plaintiff-Intervenors' Complaint in Intervention, filed. LG

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May 21—Answers of defts. Joan S. Mahan et al. to complaint and intervention of plf. intervenors, William S. Thornton et al. filed by counsel, Atty Gen. of Va. MLS

May 21—Memorandum on behalf of the Commonwealth, filed. MLS

May 21—Memorandum for the United States as Amicus Curiae, filed. MLS

May 24—Defendant's proposed finding of facts and conclusions of law, filed.

May 24—Brief on behalf of Intervenors Lewis A. McMurran, Jr., Alan A. Diamonstein, and T. V. Morrison, Jr., filed. MLS

May 24—Black Pltf-Intervenors list of exhibits filed. LG

May 24—Three Judge Court: Bryan, MacKenzie, Merhige, Judges: Appearances: Parties and by counsel. Oral argument heard. Judgment of the panel that: Trial of suit is continued. (b) Primary election of State of Va. set for June 8 is postponed until Sept. 14, 1971. (c) That unless Va. adopts reapportionment legislation on or before June 14, 1971, this court shall proceed with trial and thereafter formulate a plan of re-apportionment within prescription of Voting Rights Act. (d) Court retains jurisdiction of cases until further order.

May 24—Order of Three Judge panel entered, filed as outlined above. pv

May 24—Motion to amend complaint in intervention and order allowing same entered, filed. pv

June 2—Affidavit of Leslie C. Curdts, General Registrar of the City of Norfolk, filed. MLS

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June 2—Motion for court to amend court order, extending until 6-24-71 that time for General Assembly shall enact new reapportionment legislation; that any still unresolved issues raised by pending litigation be set down for hearing on 6-28-71, filed by Joan S. Mahan et al., June 1, 1971. MLS

June 2—Order denying defts' motion to amend May 24th Order; ent 6-2-71 and filed. Copies mailed Judges and all counsel of record. LG

June 2—Plaintiff-Intervenors' Opposition to defts' motion to amend, filed. lg

June 8—Motion for Summary Judgment, filed by defts. Prichard, Mahan, Joyner, Holton and Miller.

June 9—Original and 1 copy of reporter's transcript of proceedings of May 24, 1971 rec'd, filed. pv.

June 9—Plfs' Motion in CA 174-71-R for Modification of May 24, 1971 Order and to fix trial date, filed by pltfs in CA 174-71-R. LG

June 14—Order setting date for hearing for Wed. 6-16-71, 10:30 A.M.; ent. 6-11-71 and filed. Copies deld. to Judge. LG

June 15—Black Pltf-Intervenors' Opposition to defts' mot. for summ. judgment, filed. LG

June 15—Black Pltf-Intervenors' Response to Pltfs' Motion to modify Order & Fix trial date, filed

June 15—Black Pltf-Intervenors' Motion to proceed as in Order of 5-24-71, filed. LG

June 16—Motion by defts. to amend pre-trial Order of 3-17-71, filed. LG

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June 16—Before Three-Judge Court: (heard with CA-111-71-A and 105-71-N). Parties appeared by counsel. Case argued. gb

June 17—Evidentiary statements on behalf of Blank Plaintiff-Intervenors rec'd, filed. pv.

June 18—Defts' Response to evidentiary statements on behalf of Black Plaintiff Intervenors, filed MLS (copies mailed Judges)

July 2—Interlocutory Order declaring reapportionment statutes of 1971 invalid; members of State Senate and House be elected from electoral districts in said opinion; that defts enjoined from conducting any of said elections in districts except those established in said opinion; Gov. and Atty. Gen. of Va. dropped as parties to actions; pltfs recover costs; jurisdiction retained for enforcement ent 1:00 P.M. July 2, 1971 and filed. Copies distributed. (LG)

July 2—Opinion filed 7-2-71 from Hon. Albert V. Bryan, Circuit Judge. Copies distributed. (LG)

July 13—Notice of Appeal to Supreme Court of United States, filed by Joan S. Mahan, U. P. Joyner, Jr. and Edgar A. Prichard, Members, Virginia State Board of Elections. gb

July 13—Motion for stay of judgment pending appeal filed by Joan S. Mahan, et al. gb

July 13—Copy of order denying motion for stay pending appeal and denying motion of Virginia Beach for rehearing, entered & filed July 13, 1971 (MacKenzie, J.) gb

1971

July 15—Notice of Appeal to Supreme Court of United States filed by intervenor defendant, City of Virginia Beach. gb

July 30—Notice of Appeal to Supreme Court of the U.S. filed by plf-intervenors. MLS

July 30—Notice of Appeal to Supreme Court of the U.S. filed by Robert L. Weinberg, pro se, 1000 Hill Bldg., Washington, D.C. 20006 gb

Aug. 3—Notice of Appeal from order of July 2, 1971, filed pro se by C. Stanley Pees, 314 N. Pitt St., Alexandria, Va. 22314 gb

Aug. 4—Notice of Appeal to Supreme Court of the U.S. filed by Edmund D. Campbell, pro se, 200 N. 16th St., Arlington, Va. 22216, from order entered July 2, 1971

Oct. 28—Designation of record on appeal by plaintiff-intervenors, filed gb

Dec. 10—Designation of Record on Appeal filed by defts. Joan S. Mahan, et al. MLS

COMPLAINT

Parris, et al. v. Pritchard, et al.

Complaint To Correct Unconstitutional Malapportionment Of The House of Delegates Of The Commonwealth Of Virginia

I

This Court has original jurisdiction of this action pursuant to 28 United States Code Section 1343(3) and the plaintiffs have a right to bring this suit pursuant to the

Civil Rights Act of the United States, 42 U.S. Code Sections 1983, 1988.

II.

Under the provisions of 28 U. S. Code Sections 2281 and 2284 special provision is made for hearing causes of action involving restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state, whenever said application is based on the unconstitutionality of such statute. Plaintiffs also seek declaratory relief pursuant to the provisions of 28 U.S. Code Sections 2201 and 2202.

III

Plaintiffs and each of them are citizens of the United States and of the Commonwealth of Virginia and are registered and qualified voters in said Commonwealth and are entitled to vote for the members of the House of Delegates of the Commonwealth of Virginia.

The plaintiffs, and each of them, are duly elected incumbent members of the said House of Delegates of the Commonwealth of Virginia, and reside within the County of Fairfax, Virginia.

IV

The defendants and each of them are citizens of the United States and of the Commonwealth of Virginia and reside in said Commonwealth, and are sued in their representative capacities as hereinafter set forth.

A. Defendants Edgar A. Prichard, Joan S. Mahan, and Ulysses P. Joyner, Jr. are Members of the State Board of Elections of the Commonwealth, defendant Joyner being Chairman of such Board and defendant Mahan being secre-

tary thereof. As such, said defendants are charged with supervising and coordinating the work of City and County Electoral Boards, making rules and regulations for the conduct of elections, ordering the holding of primary elections, preparing forms and records for the registration of voters and performing other duties in respect to elections.

B. Defendant Linwood Holton is Governor and Chief Executive Officer of the Commonwealth, and under 28 U.S. Code Section 2284 must be notified of any action in a United States Court involving the enforcement of a state statute.

C. Defendant Andrew P. Miller is Attorney General of the Commonwealth, and as such is charged with the duty of assisting attorneys for the Commonwealth of any jurisdiction in which election laws have been violated and of doing all things necessary to enforce the election laws. Under 28 U.S. Code Section 2284 said defendant, as Attorney General of the Commonwealth, must be notified of any action in a United States Court involving the enforcement of a state statute.

D. The defendants Millard C. Rappleyea, Nancy D. Short, and Jones Jasper are the members of the Electoral Board of Fairfax County. As such, said defendants are charged with the duty of filing with the State Board of Elections a list of the names of candidates and of offices to be filled, preparation of ballots, preparing and having custody of voting machines, the conduct of elections in their county, canvassing the results thereof, making out certificates of eleceion for the persons having the highest number of votes for any office, including the House of Delegates, and other duties in connection therewith.

V

Plaintiffs are now denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs bring this action on their own behalf and on behalf of all of the registered and qualified voters of their respective Counties and Cities, and on behalf of all voters in Virginia who are similarly situated. Plaintiffs seek a declaration of their rights and a declaration of the validity or invalidity of the act of the Commonwealth which apportions the members of the House of Delegates among the counties and cities of Virginia. They further seek such injunctive relief as may be proper to assure them and all other voters of Virginia the free and equal franchise and the equal protection of the laws to which they are entitled under the Fourteenth Amendment to the Constitution of the United States and which rights are now being denied them by the defendants under a certain unconstitutional statute, as hereinafter more particularly set forth.

VI

Sections 40 through 43 inclusive of the Constitution of Virginia applicable at the time of the filing of this suit, provide that the legislative power of the Commonwealth shall be vested in a General Assembly which shall consist of a Senate and House of Delegates (Section 40); that the House of Delegates shall consist of not more than one hundred and not less than ninety members who shall be elected biennially by the voters of the several House districts (Section 42); and that a reapportionment of the Commonwealth into House districts shall be made in the year 1932 and every ten years thereafter (Section 43).

VII

The revised Constitution of Virginia which was agreed to by the General Assembly at the 1969 special session and the 1970 regular session and was approved by the people of Virginia in a referendum held November 3, 1970, and which becomes effective on July 1, 1971, except as provided in its "Schedule," provides in Article II, Section 6, that members of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly; that every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as practicable, representation in proportion to the population of the district; and that the General Assembly shal lreapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter. Section 5 of the Schedule to the revised Constitution provides that the General Assembly shall convene at the Capitol on January 6, 1971, in special session, shall enact such laws as may be deemed proper, and shall reapportion the Commonwealth into electoral districts in accordance with the above Article II, Section 6, of the revised Constitution.

VIII

Pursuant to provisions of the said Constitution of Virginia, the General Assembly did in 1962 apportion the Commonwealth into separate House Districts. In 1964 the 1962 apportionment act was amended. By Section 24.1-12 of the Code of Virginia enacted in 1970 the provisions of the 1962 apportionment act, as amended in 1964, were continued in effect, dividing the Commonwealth into sixty-two House districts, whose respective locations and number of Delegates are shown on Exhibit A annexed.

IX

The apportionments set forth in Exhibit "A" hereto annexed are the ones hitherto effective in the Commonwealth of Virginia. In the special session of the General Assembly of Virginia held in January and February of this year the General Assembly purported to repeal the above Section 24.1-12 and to add a new Section 24.1-12.1 reapportioning the House of Delegates into various districts. Said Section 24.1-12.1 was added by House Bill No. 63, which was signed by the Governor and became effective, subject to review by the Attorney General of the United States, on March 1, 1971. By House Bill 63, a copy of which is annexed as Exhibit "B," the Commonwealth is divided into fifty-two House districts, whose respective locations and number of Delegates are shown in said act. Also annexed as Exhibit "C" is a list showing the location and population (final 1970 U.S. Census figures) of said fifty-two new House districts as thus reapportioned by the General Assembly, the number of seats per district, the population per seat, the percentage by which each seat varies above or below the optimum population of 46,485 persons per seat, and the number of persons by which each seat is more than five percent above or below said optimum population per seat.

X

Section 24.1-174 of the Code of Virginia, as amended by the General Assembly at the 1971 special session, provides that primaries for the nomination of candidates for offices to be voted on at the general election on November 2, 1971, including candidates for the House of Delegates, shall be held on June 8, 1971, except that primaries for the nomination of candidates for county Boards of Supervisors

shall be held on September 14, 1971. Under Sections 24.1-184, 185 and 186, all primary candidates must file declarations of candidacy and appropriate petitions with party officials not later than sixty days before the primary i.e. not later than April 9, 1971. Under Section 24.1-172 of the Code, a party selecting a nominee for the House of Delegates, by any method other than direct primary must do so within the thirty days immediately preceding the primary date of June 8, 1971.

XI

Plaintiffs aver that said 1971 House reapportionment act embodied in Code section 24.1-12.1 invidiously discriminates against the plaintiffs and all other voters of the districts in which plaintiffs reside and against the voters of other House Districts in the Commonwealth, because such act creates election districts which have substantial and constitutionally impermissible variations of population:

A. The populations of the fifty-two new House districts, according to final 1970 census figures, vary from a population of 50,964 per House seat, which is 9.6% above the optimum population of 46,485 per House seat (Sixteenth district), to a population of 43,319, which is 6.8% below the optimum (Twelfth district.) The difference in population between the largest and smallest House seats is 7,645 or 16.4%.

B. House districts containing twenty-seven out of one hundred members of the House of Delegates have populations which are at least 5% above (48,809) or at least 5% below (44,161) the optimum population of 46,485.

XII

Plaintiffs, as citizens of the United States and as citizens and registered and qualified voters of the Commonwealth of Virginia, have a right to vote for members of the House of Delegates of the Commonwealth and to cast votes that are equally effective with the votes of every other citizen of said Commonwealth; but plaintiffs aver that by virtue of the invidious discrimination practiced by the General Assembly in the reapportionment statute hereinbefore referred to the votes of the plaintiffs are not as effective as the votes of voters residing in other House districts of the Commonwealth. As instances of such invidious discrimination, plaintiffs cite the following:

A. Every House district in Northern Virginia, comprising the Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, and Twenty-third House districts which include Fairfax, Arlington, Prince William and Loudoun Counties and Fairfax, Falls Church and Alexandria Cities, are under-represented. Each House seat in each such district has a population per seat ranging from 47,537 to 49,417, which is 2.3% to 6.3% above the optimum population per House seat of 46,485. Each House seat in Northern Virginia is under-represented an average of more than 4.3% per seat.

B. The Northern Virginia Counties and Cities set forth above have a total population of 921,237 persons according to the final 1970 census figures, which figure is 19.82% of the Commonwealth's total population of 4,648,494. Under said 1971 House reapportionment act, said Northern Virginia jurisdictions are allotted among them only nineteen House seats or 19% of a total of one hundred although under the 1971 Senate reapportionment act they

are allotted eight Senate seats or a full 20% of a total of forty, and under the 1971 Congressional reapportionment act (Code Section 24.1-4.1) they are allotted two Congressional seats or a full 20% of a total of 10.

C. The instances of invidious discrimination set forth above are particularly unfair and discriminatory in that said Northern Virginia Counties and Cities as an area comprise the fastest growing region in the Commonwealth. During the past decade they grew at an average rate of 46% as compared with a State-wide average of 17.2%. Growth rates varied from 5.7% for the City of Falls Church (population 10,772) to 51.3% for Loudoun County (37,150), 65.5% for Fairfax County (455,021), and 121.5% for Prince William County (111,102).

D. In contrast, the City of Norfolk with a population of 307,951 is given under said 1971 House reapportionment act seven House seats (Thirty-ninth district), each of which seats has a population of 43,933. Thus, the Norfolk district and each of such seven seats are overrepresented by 5.4%, although during the last decade Norfolk grew at a rate of only 1%, and although there are included in the total Norfolk population 36,000 naval personnel who are on U.S. Naval vessels overseas and are included in the Norfolk total only because their ships berth at the Norfolk Navy Yard. Many of these personnel undoubtedly reside elsewhere in the Commonwealth and in the United States.

E. In further contrast, the City of Chesapeake with a population of 89,580 is given under said 1971 House reapportionment act two House seats (Thirty-eighth district), each of which has a population of 44,790. Thus, the Chesapeake district and each of such seats are overrepresented by 3.6%. In addition, however, under said act

Chesapeake shares with the residents of the Cities of Virginia Beach and Portsmouth a third "floater" House seat (Forty-second district). Therefore, the residents of Chesapeake, who are mathematically entitled to 1.9 House seats, will under said act vote for and be represented by three Delegates holding said seats.

XIII

The fundamental principle relied upon in the creation of the said 1971 House reapportionment act and the House districts created by it was and is the desire of the General Assembly to adhere to the political and geographical boundaries of the various counties and cities within the Commonwealth of Virginia. That principle is violated in the 1971 House reapportionment act in only one instance in all of the existing political jurisdictions, both counties and cities, in the Commonwealth. That instance is that portion of the act which divides Fairfax County between two separate districts (Eighteenth and Nineteenth), with two separate five member districts each. All other House district boundaries conform to the geographical boundaries of existing political jurisdictions and permit the qualified voters therein to select qualified candidates from any portion of any such jurisdiction, thereby assuring any qualified person the opportunity to stand as a candidate for election to the applicable House district, and in addition, providing the maximum possible unification of political representation by those persons elected to the House of Delegates from any given jurisdiction.

XIV

Plaintiffs aver that the establishment by the said 1971 House reapportionment act of two five-member House dis-

tricts, one consisting of the portion of Fairfax County in the Tenth Congressional District and the Cities of Fairfax and Falls Church (Eighteenth) and the other comprising the portion of Fairfax County in the Eighth Congressional District (Nineteenth), will result in invidious discrimination against the plaintiffs and other voters residing in said districts.

XV

Plaintiffs aver that when the inequalities in the above mentioned reapportionment statute are considered, they result in a distortion of the constitutional requirements as established, defined and guaranteed by the Fourteenth Amendment to the Constitution of the United States, and that this distortion denies to plaintiffs the equal protection of the laws.

XVI

Plaintiffs aver that the constitutional requirements aforementioned can only be met by a revision of the 1971 House reapportionment act so as to reapportion House districts and seats among the Counties and Cities of Northern Virginia hereinbefore mentioned so as to allot them one additional House seat, and so as to order the establishment of all of Fairfax County as a single election district.

XVII

The special session of the General Assembly of Virginia which was held in January and February of this year, has adjourned until March 29, 1971, and then or thereafter may adjourn to a later date. In the meantime, there will be a primary election throughout the Commonwealth for members of the House of Delegates on June 8, 1971, and

unless the inequities herein complained of are corrected by this Court, the plaintiffs and all other voters similarly situated will be denied the equal protection of the laws in said elections. The defendants, unless prevented by this Court will perform their duties in the conduct of such elections in an unconstitutional manner.

Wherefore, plaintiffs pray:

1. That this Court may take jurisdiction of this controversy.

2. That a special three-judge court be called and impanelled to hear and determine this action and to declare the rights of plaintiffs in the premises to be as follows:

A. That the reapportionment of House districts in the Commonwealth of Virginia made by Section 24.1-12.1 of the Code of Virginia denies the plaintiffs and other voters of the Commonwealth similarly situated the equal protection of the laws, in contravention of the Fourteenth Amendment of the Constitution of the United States.

B. That said Section 24.1-12.1, as now in force, insofar as it applies to the County of Fairfax, is unconstitutional and void.

3. That upon final hearing of this action, the Court grant to the plaintiffs the following further relief:

A. That the defendants and each of them be permanently restrained and enjoined from furnishing forms for nominations, from receiving the names of candidates, notices of candidacy or petitions therefor, from ordering or conducting the Primary election scheduled to be held on June 8, 1971, or the General election

scheduled to be held on November 2, 1971, from certifying the results of either such election, and from taking any and all other steps with respect to the election of members of the House of Delegates of the Commonwealth of Virginia under and pursuant to Code Section 24.1-12.1, until there has been a further reapportionment of House districts in accordance with constitutional requirements as approved or promulgated by this Court.

B. That this Court notify the Speaker of the House of Delegates and the President of the Senate of the General Assembly of Virginia as well as the defendants herein, of its decision and opinion so that when the General Assembly reconvenes on March 29, 1971, or is called back into session at a later date it will be afforded a reasonable opportunity to enact legislation amending or repealing the 1971 House redistricting statute and reapportioning the several House districts and seats in accordance with constitutional requirements and the decision and opinion of this Court.

C. That this Court retain jurisdiction of this cause until such time as the General Assembly amends the 1971 House reapportionment act or enacts new reapportionment legislation in accordance with constitutional requirements; that it hold further hearings to determine the validity of such amended or new apportionment legislation; and that in the absence of enactment by the General Assembly of a valid new House reapportionment act, this Court retain jurisdiction in order to promulgate an apportionment plan for the House of Delegates which meets constitutional requirements.

D. That this Court enjoin, postpone, and defer the holding of the Primary election for members of the House of Delegates scheduled to be held on June 8, 1971, postpone and defer the deadline of April 9, 1971 for filing notices of candidacy and petitions therefor, and postpone and defer the date by which candidates for the House of Delegates selected by any method other than a direct primary must be selected or certified in accordance with the provisions of the applicable statutes of the Commonwealth of Virginia, until an appropriate date subsequent to a reapportionment of House districts in accordance with constitutional requirements as approved or promulgated by this Court.

4. That the plaintiffs may have such further and alternative relief as the nature of this action may require and this Court may deem proper.

/s/ STANFORD E. PARRIS
4085 Chain Bridge Road
Fairfax, Virginia 22030
Attorney for Plaintiffs
Tel. No. 591-7100

State of Virginia,

County of Fairfax, to-wit:

I, Stanford E. Parris, do hereby swear that I am one of the plaintiffs in the above action; that I have read the foregoing and annexed Complaint and know the contents thereof; and that the matters and things therein stated are true to the best of my knowledge, information and belief.

/s/ STANFORD E. PARRIS

Subscribed and sworn to before me this 22nd day of March, 1971.

/s/ PATRICIA M. CUNNINGHAM
Notary Public

My commission expires: July 23, 1974

Exhibit A

§ 24.1-12. Apportionment of Members of House of Delegates.—Members of the House of Delegates shall be distributed and apportioned, and each county, city and combination is entitled to representation in the House of Delegates by a delegate, or by delegates, as follows:

First.—Chesapeake, two.

Second.—Accomack and Northampton, one.

Third.—Albemarle and Greene, one.

Fourth.—Charlottesville, one.

Fifth.—Alexandria, two.

Sixth.—Alleghany, Botetourt, Covington and Clifton Forge, one.

Seventh.—Amelia, Lunenburg and Nottoway, one.

Eighth.—Amherst and Lynchburg, one.

Ninth.—Arlington, four.

Tenth.—Augusta, Highland, Staunton and Waynesboro, two.

Eleventh.—Bedford County and the city of Bedford, one.

Twelfth.—Bland, Craig, Giles, Pulaski and Wythe, two.

Thirteenth.—Danville and Pittsylvania, one.

Fourteenth.—Brunswick and Dinwiddie, one.

Fifteenth.—Buchanan, one.

Sixteenth.—Russell and Dickenson, one.

Seventeenth.—Roanoke County, and the cities of Roanoke and Salem, one.

Eighteenth.—Campbell, one.

Nineteenth.—Caroline, King George, Essex and King and Queen, one.

Twentieth.—Fairfax County, and the cities of Alexandria, Fairfax and Falls Church, one.

Twenty-first.—James City, York and Williamsburg, one

Twenty-second.—Charlotte, Cumberland and Prince Edward, one.

Twenty-third.—Chesterfield and Colonial Heights, two.

Twenty-fourth.—Clark, Frederick and Winchester, one.

Twenty-fifth.—Danville, one.

Twenty-sixth.—Hampton, two.

Twenty-seventh.—Fairfax County, and the cities of Fairfax and Falls Church, six.

Twenty-eighth.—Fauquier, Warren and Rappahannock, one.

Twenty-ninth.—Fluvanna, Goochland, Louisa and Powhatan, one.

Thirtieth.—Franklin County and Floyd, one.

Thirty-first.—Gloucester, Mathews, New Kent, Charles City and Middlesex, one.

Thirty-second.—Carroll, Grayson and Galax, one.

Thirty-third.—Greensville, Surry, Sussex and Emporia, one.

Thirty-fourth.—Halifax and South Boston, one.

Thirty-fifth.—Hanover and King William, one.

Thirty-sixth.—Henrico, and city of Richmond, eight.

Thirty-seventh.—Henry, Patrick and Martinsville, two.

Thirty-eighth.—Isle of Wight, Southampton, and the city of Franklin, one.

Thirty-ninth.—Northumberland, Westmoreland, Lancaster and Richmond County, one.

Fortieth.—Newport News, three.

Forty-first.—Lee, Wise, and city of Norton, two.

Forty-second.—Loudoun and Prince William, two.

Forty-third.—Lynchburg, one.

Forty-fourth.—Madison, Culpeper and Orange, one.

Forty-fifth.—Mecklenburg, one.

Forty-sixth.—Montgomery and Radford, one.

Forty-seventh.—Nansemond and Suffolk, one.

Forty-eighth.—Nelson, Appomatox and Buckingham, one.

Forty-nine.—Norfolk City, seven.

Fiftieth.—Page, Rockingham, Shenandoah and Harrisonburg, two.

Fifty-first.—Petersburg, one.

Fifty-second.—Pittsylvania, one.

Fifty-third.—Portsmouth, three.

Fifty-fourth.—Prince George and Hopewell, one.

Fifty-fifth.—Virginia Beach, two.

Fifty-sixth.—Roanoke County, and the city of Salem, one.

Fifty-seventh.—Roanoke City, two.

Fifty-eighth.—Rockbridge, Bath and Buena Vista and Lexington, one.

Fifty-ninth.—Smyth, one.

Sixtieth.—Spotsylvania, Stafford and Fredericksburg, one.

Sixty-first.—Tazewell, one.

Sixty-second.—Washington, Scott and Bristol, two.

And the districts hereby created are hereby numbered one (1) to sixty-two (62) inclusive.

Exhibit B

Chapter

An Act to amend the Code of Virginia by adding a section numbered 24.1-12.1, and to repeal § 24.1-12 of the Code of Virginia, the new and repealed sections relating to apportionment of members of the House of Delegates. [H 63]

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding a section numbered 24.1-12.1 as follows:

§ 24.1-12.1. Apportionment of members of House of Delegates.—Members of the House of Delegates shall be distributed and apportioned, and each county, city and combination is entitled to representation in the House of Delegates by a delegate, or by delegates, as follows:

First.—Dickenson, Lee, Wise, Scott and Norton, two.

Second.—Bristol, Smyth and Washington, two.

Third.—Russell, Tazewell and Buchanan, two.

Fourth.—Wythe, Grayson, Bland and Galax, one.

Fifth.—Craig, Giles and Pulaski, one.

Sixth.—Carroll, Floyd, Montgomery and Radford, two.

Seventh.—Roanoke City, two.

Eighth.—Roanoke County and Salem, two.

Ninth.—Franklin County, Rockbridge, Bedford County and Bedford City, and the cities of Lexington and Buena Vista, two.

Tenth.—Alleghany, Botetourt, Clifton Forge and Covington, one.

Eleventh.—Lynchburg, Amherst and Nelson, two.

Twelfth.—Campbell, one.

Thirteenth.—Patrick, Henry, Pittsylvania and Martinsville, three.

Fourteenth.—Danville, one.

Fifteenth,—Augusta, Highland, Staunton, Waynesboro and Bath, two.

Sixteenth.—Rockingham, Page, Shenandoah and Harrisonburg, two.

Seventeenth.—Frederick, Clarke, Fauquier, Warren and Winchester, two.

Eighteenth.—That portion of Fairfax County which lies in the Tenth Congressional District as described in § 24.1-4.1 Fairfax City and Falls Church, five.

Nineteenth.—That portion of Fairfax County which

lies in the Eighth Congressional District as described in § 24.1-4.1, five.

Twentieth.—Loudoun and Prince William, three.

Twenty-first.—Alexandria, two.

Twenty-second.—Arlington, three.

Twenty-third.—Alexandria and Arlington, one.

Twenty-fourth.—Hanover, Caroline, Stafford and Fredericksburg, two.

Twenty-fifth.—Culpeper, Rappahannock, Madison and Orange, one.

Twenty-sixth.—Albemarle, Greene, Fluvanna and Charlottesville, two.

Twenty-seventh.—Appomattox, Buckingham, Cumberland, Amelia and Prince Edward, one.

Twenty-eighth.—Charlotte, Halifax and South Boston, one.

Twenty-ninth.—Mecklenburg and Brunswick, one.

Thirteenth.—Petersburg, including those portions of Prince George and Dinwiddie Counties as described in the court's opinion in the annexation suit of Petersburg against the counties of Prince George and Dinwiddie, one.

Thirty-first.—Dinwiddie, excluding those portions encompassed within the thirtieth district, Lunenburg and Nottoway, one.

Thirty-second.—Louisa, Spotsylvania, Goochland and Powhatan, one.

Thirty-third.—Richmond City, five.

Thirty-fourth.—Henrico, three.

Thirty-fifth.—Henrico and Richmond City, one.

Thirty-sixth.—Chesterfield and Colonial Heights, two.

Thirty-seventh.—Prince George, excluding those portions encompassed within the thirtieth district, and Hopewell, one.

Thirty-eighth.—Chesapeake, two.

Thirty-ninth.—Norfolk, seven.

Fortieth.—Virginia Beach, three.

Forty-first.—Portsmouth, two.

Forty-second.—Virginia Beach, Chesapeake and Portsmouth, one.

Forty-third.—Nansemond and Suffolk, one.

Forty-fourth.—Southampton, Franklin City and Isle of Wight, one.

Forty-fifth.—Greensville, Emporia, Sussex, Surry, Charles City and New Kent, one.

Forty-sixth.—Accomack and Northampton, one.

Forty-seventh.—King George, Westmoreland, Northumberland, Richmond County and Lancaster, one.

Forty-eighth.—Essex, King and Queen, Middlesex, Gloucester, Mathews, and King William, one.

Forty-ninth.—Newport News, three.

Fiftieth.—Hampton, two.

Fifty-first.—James City, Williamsburg and York, one.

Fifty-second.—Hampton, James City, Williamsburg and York, one.

Reference to a county or city herein shall, unless otherwise specifically provided, be construed to mean the territory comprising such county or city as it exists on the effective date of this enactment notwithstanding future boundary changes by annexation, merger, consolidation or the voiding of boundary changes heretofore made final.

And the districts hereby created are hereby numbered one (1) to fifty-two (52), inclusive.

2. That § 24.1-12 of the Code of Virginia is hereby repealed.

President of the Senate

Speaker of the House of Delegates

Approved:

Governor

Exhibit C

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop./Seat	Numerical Variance/Seat Above 48,809 (+5%) or Below 44,161 (−5%)
First:					
Dickenson	16,077				
Lee	20,321				
Wise	35,947				
Scott	24,376				
Norton	4,001				
	100,722	+8.3	2	50,361	+1552
Second					
Bristol	14,857				
Smyth	31,349				
Washington	40,835				
	87,041	−6.4	2	43,521	−640
Third:					
Russell	24,533				
Tazewell	39,816				
Buchanan	32,071				
	96,420	+3.7	2	48,210	
Fourth:					
Wythe	22,139				
Grayson	15,439				
Bland	5,423				
Galax	6,278				
	49,279	+6.0	1	49,279	+470
Fifth:					
Craig	3,524				
Giles	16,741				
Pulaski	29,564				
	49,829	+7.2	1	49,829	+1020
Sixth:					
Carroll	23,092				
Floyd	9,775				
Montgomery	47,157				
Radford	11,596				
	91,620	−1.5	2	45,810	

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop./Seat	Numerical Variance/Seat Above 48,809 (+5%) or Below 44,161 (−5%)
Seventh:					
Roanoke City	92,115	−0.9	2	46,058	
Eighth:					
Roanoke Co.	67,339				
Salem	21,982				
	89,321	−3.9	2	44,661	
Ninth:					
Franklin Co.	26,858				
Rockbridge	16,637				
Bedford Co.	26,728				
Bedford City	6,011				
Lexington	7,597				
Buena Vista	6,425				
	90,256	−2.9	2	45,128	
Tenth:					
Alleghany	12,461				
Botetourt	18,193				
Clifton Forge	5,501				
Covington	10,060				
	46,215	−0.6	1	46,215	
Eleventh:					
Lynchburg	54,083				
Amherst	26,072				
Nelson	11,702				
	91,857	−4.2	2	45,929	
Twelfth:					
Campbell	43,319	−6.8	1	43,319	−842

COPY BOUND

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop./Seat	Numerical Variance/Seat Above 48,809 (+5%) or Below 44,161 (−5%)
Thirteenth:					
Patrick	15,282				
Henry	50,901				
Pittsylvania	58,789				
Martinsville	19,653				
	144,625	+3.7	3	48,208	
Fourteenth:					
Danville	46,391	−0.2	1	46,391	
Fifteenth:					
Augusta	44,220				
Highland	2,529				
Staunton	24,504				
Waynesboro	16,707				
Bath	5,192				
	93,152	+ .2	2	46,576	
Sixteenth:					
Rockingham	47,890				
Page	16,581				
Shenandoah	22,852				
Harrisonburg	14,605				
	101,928	+9.6	2	50,964	+2155
Seventeenth:					
Frederick	28,893				
Clarke	8,102				
Fauquier	26,375				
Warren	15,301				
Winchester	14,643				
	93,314	+0.4	2	46,657	
Eighteenth:					
Fairfax City	21,970				
Falls Church	10,772				
(Part) Fairfax County	213,767				
	246,509	+6.1	5	49,302	+493

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop./Seat	Numerical Variance/Seat Above 48,809 (+5%) or Below 44,161 (−5%)
Nineteenth:					
(Part) Fairfax County	241,254	+3.8	5	48,251	
Twentieth:					
Loudoun	37,150				
Prince William	111,102				
	148,252	+6.3	3	49,417	+608
Twenty-first:					
Alexandria	110,938	+2.3	2	47,537	
Twenty-second					
Arlington	174,284	+2.3	3	47,537	
Twenty-third:					
Arlington and Alexandria	285,222 (floater)	+2.3	1	47,537	
Twenty-fourth:					
Hanover	37,479				
Caroline	13,925				
Stafford	24,587				
Fredericksburg	14,450				
	90,441	−2.7	2	45,221	
Twenty-fifth:					
Culpeper	18,218				
Rappahannock	5,199				
Madison	8,638				
Orange	13,792				
	45,847	−1.4	1	45,847	

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop./Seat	Numerical Variance/Seat Above 48,809 (+5%) or Below 44,161 (−5%)
Twenty-sixth:					
Albemarle	37,780				
Greene	5,248				
Fluvanna	7,621				
Charlottesville	38,880				
	89,529	−3.7	2	44,765	
Twenty-seventh:					
Appomattox	9,784				
Buckingham	10,597				
Cumberland	6,179				
Amelia	7,592				
Prince Edward	14,379				
	48,531	+4.4	1	48,531	
Twenty-eighth:					
Charlotte	11,551				
Halifax	30,076				
South Boston	6,889				
	48,516	+4.4	1	48,516	
Twenty-ninth:					
Mecklenburg	29,426				
Brunswick	16,172				
	45,598	−1.9	1	45,598	
Thirtieth:					
Petersburg	36,103				
(Increased annex area)	9,000				
	45,103	−3.0	1	45,103	
Thirty-first:					
Dinwiddie	25,046				
Lunenburg	11,687				
Nottoway	14,260				
	50,993				

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop./Seat	Numerical Variance/Seat Above 48,809 (+5%) or Below 44,161 (−5%)
(Annexed loss—Dinwiddie)	−4,000				
	46,993	+1.1	1	46,993	
Thirty-second:					
Louisa	14,004				
Spottsylvania	16,424				
Goochland	10,069				
Powhatan	7,696				
	48,193	+3.7	1	48,193	
Thirty-third:					
Richmond City	249,621	−3.4	5	44,887	
Thirty-fourth:					
Henrico	154,364	−3.4	3	44,887	
Thirty-fifth:					
Richmond City and Henrico	(floater)	−3.4	1	44,887	
Thirty-sixth:					
Chesterfield	76,855				
Colonial Height	15,097				
	91,952	−1.1	2	45,976	
Thirty-seventh:					
Prince George	29,092				
Hopewell	23,471				
	52,563				
Annexed loss—Prince George	−5,000				
	47,563	+2.3	1	47,563	

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop./Seat	Numerical Variance/Seat Above 48,809 (+5%) or Below 44,161 (−5%)
Thirty-eighth, Fortieth, Forty-first, Forty-second:					
Chesapeake	89,580				
Virginia Beach	172,106				
Portsmouth	110,963				
	372,649	+ .2	8	46,581	
Thirty-ninth:					
Norfolk	307,951	−5.4	7	43,993	−168
Forty-third:					
Nansemond	35,166				
Suffolk	9,858				
	45,024	−3.2	1	45,024	
Forty-fourth:					
Southampton	18,582				
Franklin City	6,880				
Isle of Wight	18,285				
	43,747	−5.9	1	43,747	−414
Forty-fifth:					
Greensville	9,604				
Emporia	5,300				
Sussex	11,464				
Surry	5,882				
Charles City	6,158				
New Kent	5,300				
	43,708	−6.0	1	43,708	−453
Forty-sixth:					
Accomack	29,004				
Northampton	14,442				
	43,446	−6.5	1	43,446	−715

D CLOSE IN CENTER

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop./Seat	Numerical Variance/Seat Above 48,809 (+5%) or Below 44,161 (−5%)
Forty-seventh:					
King George	8,039				
Westmoreland	12,142				
Northumberland	9,239				
Richmond Co.	5,841				
Lancaster	9,126				
	44,387	—4.5	1	44,387	
Forty-eighth:					
Essex	7,099				
King & Queen	5,491				
Middlesex	6,295				
Gloucester	14,059				
Mathews	7,168				
King William	7,497				
	47,609	+2.4	1	47,609	
Forty-ninth:					
Newport News	138,177	— .9	3	46,059	
Fiftieth, Fifty-first. Fifty-second:					
Hampton	120,779				
James City	17,853				
Williamsburg	9,069				
York	33,203				
	180,904	—2.7	4	45,226	

* * *

ANSWER

Now comes the Attorney General of Virginia, Andrew P. Miller, as counsel for defendants Edgar A. Prichard, Member, State Board of Elections; Joan S. Mahan, Secretary, State Board of Elections; Ulysses P. Joyner, Jr., Chairman, State Board of Elections; A. Linwood Holton, Governor of Virginia; and Andrew P. Miller, Attorney General of Virginia, and in response to the Complaint filed herein answers and says:

First Defense

The Governor and Attorney General of the Commonwealth of Virginia do not threaten plaintiffs or any other person with the operation, enforcement or execution of any law, nor has a cause of action been stated against said defendants. The requirement that said defendants be served notice pursuant to 28 U.S.C. § 2284 is not sufficient basis to make them parties to the action. They are therefore neither a necessary nor a proper party to this suit and should be dismissed.

Second Defense

The Complaint fails to state a claim upon which relief can be granted.

Third Defense

This Court is without jurisdiction to entertain the instant suit inasmuch as it presents a non-justiciable question.

Fourth Defense

In response to the allegations in the Complaint, defendants:

(a) Deny the allegation of Paragraph I of the Complaint.

(b) Admit the allegations of Paragraphs II, III and IV of the Complaint, except that they deny that the Attorney General and Governor are necessary and proper parties.

(c) Deny the allegations of Paragraph V of the Complaint.

(d) Aver the allegations contained in Paragraphs VI, VII, VIII, IX and X of the Complaint are conclusions of law and do not call for an answer, except that defendants deny the relevancy of those facts in Paragraphs IX and XI relating to those House seats either five percent above or below the optimum population.

(e) Deny as to the remaining allegations in Paragraph XI of the Complaint that the act therein referred to creates substantial and constitutionally impermissible variations of population within its House Districts.

(f) Admit that all of the citizens of the Commonwealth of Virginia have an inherent right to cast votes the weight of which is as near as practicable to the weight of the vote of all other citizens of the Commonwealth of Virginia, but they deny that the reapportionment statutes adopted by the General Assembly in 1971 invidiously discriminate against the plaintiffs or any other citizens of the Commonwealth by denying them this right; and they further state that the allegations of sub-paragraph (c) of Paragraph XII of the Complaint are irrelevant to a consideration of the Complaint.

(g) With regard to the allegations of Paragraph XIII of the Complaint, defendants state that this is a matter of political policy to be determined by the Legislature of the

Commonwealth of Virginia and that such consideration is beyond the jurisdiction of this Court.

(h) Deny the allegations of Paragraphs XIV, XV and XVI of the Complaint.

(i) Admit the allegations of Paragraph XVII of the Complaint, except that defendants deny that any inequities in the reapportionment statute exist which would deny the plaintiffs and any other voters in the Commonwealth equal protection of the laws as the result of any elections held as a result of said statute, nor that they will conduct any elections pursuant to the said statutes in an unconstitutional manner.

Wherefore, having fully answered, and any allegations not answered are deemed to be denied, defendants pray that they be dismissed with their costs herein.

* * *

COMPLAINT

DuVal, et al. v. Prichard, et al.

Voters' Complaint To Correct Malapportionment Of The House Of Delegates Of The Commonwealth Of Virginia

I

This Court has original jurisdiction of this action pursuant to 28 U.S. Code Section 1343(3) and the plaintiffs have a right to bring this suit pursuant to the Civil Rights Act of the United States, 42 U.S. Code Sections 1983, 1988.

II

Under the provisions of 28 U.S. Code Sections 2281 and 2284 special provision is made for hearing causes of action

involving restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state, whenever said application is based on the unconstitutionality of such statute. Plaintiffs also seek declaratory relief pursuant to the provisions of 28 U.S. Code Sections 2201 and 2202.

III

Plaintiffs and each of them are citizens of the United States and of the Commonwealth of Virginia and are registered and qualified voters in said Commonwealth and are entitled to vote for the members of the General Assembly of the Commonwealth of Virginia. In particular:

A. Plaintiffs Clive L. DuVal, 2d, Adelard L. Brault, Robert C. Fitzgerald, Omer L. Hirst, William S. Hoofnagle, Augustus C. Johnson, Mary Ann Hurt, Joseph V. Gartlan, Jr., Kenneth A. Meiklejohn, James H. Burch, Jr., and John M. Wilkins are residents of Fairfax County. Plaintiff Gartlan is a resident of Lee District and Plaintiff Meiklejohn is a resident of Mount Vernon District within such County.

B. Plaintiff Hugo A. Blankingship Jr., is a resident of Fairfax City.

C. Plaintiffs Thomas G. Eastham, Lee M. Rhoads, and Edith R. Abramson are residents of the City of Falls Church.

D. Plaintiffs Joseph S. Wholey, Ira M. Lechner, Robert L. Weinberg, and Audrey S. Wyatt are residents of Arlington County.

C. Plaintiffs Melvin L. Bergheim, C. Stanley Dees, and Alice M. Leonard are residents of the City of Alexandria.

F. Plaintiff Charles L. Waddell is a resident of Loudoun County.

G. Plaintiff James G. Jewell is a resident of Prince William County.

Plaintiffs jointly and severally bring this action on their own behalf and on behalf of all other voters similarly situated in the Commonwealth of Virginia.

IV

The defendants and each of them are citizens of the United States and of the Commonwealth of Virginia and reside in said Commonwealth, and are sued in their representative capacities as hereinafter set forth.

A. Defendants Edgar A. Prichard, Joan S. Mahan, and Ulysses P. Joyner, Jr. are Members of the State Board of Elections of the Commonwealth, defendant Joyner being Chairman of such Board and defendant Mahan being secretary thereof. As such, said defendants are charged with supervising and coordinating the work of City and County Electoral Boards, making rules and regulations for the conduct of elections, ordering the holding of primary elections, preparing forms and records and a central roster for the registration of voters and performing such other duties in respect to elections.

B. Defendant Linwood Holton is Governor and Chief Executive Officer of the Commonwealth, and under 28 U.S. Code Section 2284 must be notified of any action in a United States Court involving the enforcement of a state statute.

C. Defendant Andrew P. Miller is Attorney General of the Commonwealth, and as such is charged with the duty of assisting attorneys for the Commonwealth of any jurisdic-

tion in which election laws have been violated and of doing all things necessary to enforce the election laws. Under 28 U.S. Code Section 2284 said defendant, as Attorney General of the Commonwealth, must be notified of any action in a United States Court involving the enforcement of a state statute.

D. The defendants Millard C. Rappleyea, Nancy D. Short, and Jones Jasper are the members of the Electoral Board of Fairfax County. As such, said defendants are charged with the duty of filing with the State Board of Elections a list of the names of candidates and of offices to be filled, preparation of ballots, preparing and having custody of voting machines, the conduct of elections in their county, canvassing the results thereof, making out certificates of election for the persons having the highest number of votes for any office, including the Senate and House of Delegates, and other duties in connection therewith. They are sued as representatives of all of the members of county and city electoral boards in the Commonwealth, such persons constituting a class so numerous as to make it impracticable to bring them all before the court. This action involves common questions of law and fact affecting the several rights of all of said members, and common relief is sought against them.

V

Plaintiffs are now denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs bring this action on their own behalf and on behalf of all of the registered and qualified voters of their respective Counties and Cities, and on behalf of all voters in Virginia who are similarly situated. Plaintiffs seek a declaration of their rights and a declaration of the validity or invalidity of the

act of the Commonwealth which apportions the members of the House of Delegates among the counties and cities of Virginia. They further seek such injunctive relief as may be proper to assure them and all other voters of Virginia the free and equal franchise and the equal protection of the laws to which they are entitled under the Fourteenth Amendment to the Constitution of the United States and which rights are now being denied them by the defendants under a certain unconstitutional statute, as hereinafter more particularly set forth.

VI

Sections 40 through 43 inclusive of the Constitution of Virginia which became effective in 1902 and which, as amended from time to time, continues in effect until July 1, 1971 except as to the reapportionment provisions, provide that the legislative power of the Commonwealth shall be vested in a General Assembly which shall consist of a Senate and House of Delegates (Section 40); that the Senate shall consist of not more than forty and not less than thirty-three members who shall be elected quadrennially by the voters of the several senatorial districts (Section 41); that the House of Delegates shall consist of not more than one hundred and not less than ninety members who shall be elected biennially by the voters of the several House districts (Section 42); and that a reapportionment of the Commonwealth into Senatorial and House districts shall be made in the year 1932 and every ten years thereafter (Section 43).

VII

Article IV, Sections 1 through 3 inclusive of the revised Constitution of Virginia which was agreed to by the General Assembly at the 1969 special session and the 1970 regular session and was approved by the people of Virginia

in a referendum held November 3, 1970, and which becomes effective on July 1, 1971, except as provided in its "Schedule," contain the same provisions as the above Sections 40 through 42 of the 1902 Constitution. Article II, Section 6, of the revised Constitution provides that members of the Senate and House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly; that every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as practicable, representation in proportion to the population of the district; and that the General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter. Section 5 of the Schedule to the revised Constitution provides that the General Assembly shall convene at the Capitol on January 6, 1971, in special session, shall enact such laws as may be deemed proper, and shall reapportion the Commonwealth into electoral districts in accordance with the above Article II, Section 6, of the revised Constitution.

VIII

Pursuant to said provisions of the 1902 Constitution of Virginia, the General Assembly did in 1962 apportion the Commonwealth into separate Senatorial and House Districts. In 1964 the 1962 apportionment act was amended. By Section 24.1-12 of the Code of Virginia enacted in 1970 the provisions of the 1962 apportionment act, as amended in 1964, were continued in effect, dividing the Commonwealth into sixty-two House districts, whose respective locations and number of Delegates are shown on Exhibit A annexed. By Section 24.1-14 of the Code of Virginia, the Commonwealth was divided into thirty-three Senate districts, whose respective locations and number of Senators are shown on Exhibit B annexed.

IX

The apportionments set forth in Exhibits "A" and "B" hereto annexed are the ones hitherto effective in the Commonwealth of Virginia. In the special session of the General Assembly of Virginia held in January and February of this year the General Assembly purported to repeal the above Sections 24.1-12 and 24.1-14 and to add new Sections 24.1-12.1 and 24.1-14.1, respectively reapportioning the House and Senate districts. Said Section 24.1-12.1 was added by House Bill No. 63, which was signed by the governor and became effective, subject to review by the Attorney General of the United States, on March 1, 1971. By House Bill 63, a copy of which is annexed as Exhibit C, the Commonwealth is divided into fifty-two House districts, whose respective locations and number of Delegates are shown in said act. Also annexed as Exhibit D is a list showing the location and population (final 1970 U.S. Census figures) of said fifty-two new House districts as thus reapportioned by the General Assembly, the number of seats per district, the population per seat, the percentage by which each seat varies above or below the optimum population of 46,485 persons per seat, and the number of persons by which each seat is more than five percent above or below said optimum population per seat.

Said Section 24.1-14.1 was added by Committee substitute for Senate Bill No. 54, which was also signed by the governor and became effective, subject to review by the Attorney General of the United States, on March 1, 1971. By Committee substitute for Senate Bill No. 54, a copy of which is annexed as Exhibit E, the Commonwealth is divided into forty, single-Senator districts, the locations of which are shown in said act.

X

Section 24.1-174 of the Code of Virginia, as amended by the General Assembly at the 1971 special session, provides that primaries for the nomination of candidates for offices to be voted on at the general election on November 2, 1971, including candidates for the Senate and House of Delegates, shall be held on June 8, 1971, except that primaries for the nomination of candidates for county boards of supervisors shall be held on September 14, 1971. Under Sections 24.1-184, 185 and 186, all primary candidates must file declarations of candidacy and appropriate petitions with party officials not later than sixty days before the primary—i.e., in the case of candidates for the Senate and House of Delegates, not later than April 9, 1971. Under Section 24.1-172 of the Code, a party selecting a nominee for any office, including the Senate and House of Delegates, by any method other than direct primary must do so within the thirty days immediately preceding the primary date of June 8, 1971.

XI

Plaintiffs aver that said 1971 House reapportionment act embodied in Code Section 24.1-12.1 invidiously discriminates against the plaintiffs and all other voters of the districts in which plaintiffs reside and against the voters of many other House Districts in the Commonwealth, because such act creates many districts which have substantial and constitutionally impermissible variations of population:

A. The populations of the fifty-two new House districts, according to final 1970 census figures vary from a population of 50,964 per House seat, which is 9.6% above the optimum population of 46,485 per House seat (Sixteenth district), to a population of 43,319, which is 6.8% below the optimum (Twelfth district). The difference in popula-

tion between the largest and smallest House seats is 7,645 or 16.4%.

B. House districts containing twenty-seven out of one hundred members of the House of Delegates have populations which are at least 5% above (48,809) or at least 5% below (44,161) the optimum population of 46,485.

XII

Plaintiffs, as citizens of the United States and as citizens and registered and qualified voters of the Commonwealth of Virginia, possess an inherent right to vote for members of the General Assembly of the Commonwealth and to cast votes that are equally effective with the votes of every other citizen of said Commonwealth; but plaintiffs aver that by virtue of the invidious discrimination practiced by the General Assembly in the reapportionment statute hereinbefore referred to the votes of the plaintiffs are not as effective as the votes of voters residing in other House districts of the Commonwealth. As instances of such invidious discrimination, plaintiffs cite the following:

A. Every House district in Northern Virginia, comprising the Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second and Twenty-third House districts which include Fairfax, Arlington, Prince William and Loudoun Counties and Fairfax, Falls Church and Alexandria Cities, are under-represented. Each House seat in each such district has a population per seat ranging from 47,537 to 49,417, which is 2.3% to 6.3% above the optimum population per House seat of 46,485. Each House seat in Northern Virginia is under-represented an average of more than 4.3% per seat.

B. The Northern Virginia Counties and Cities set forth above have a total population of 921,237 persons according

to the final 1970 census figures, which figure is 19.82% of the Commonwealth's total population of 4,648,494. Under said 1971 House reapportionment act, said Northern Virginia jurisdictions are allotted among them only nineteen House seats or 19% of a total of one hundred although under the 1971 Senate reapportionment act they are allotted eight Senate seats or a full 20% of a total of forty, and under the 1971 Congressional reapportionment act (Code Section 24.1-41) they are allotted two Congressional seats or a full 20% of a total of 10.

C. The instances of invidious discrimination set forth above are particularly unfair and discriminatory in that said Northern Virginia Counties and Cities as an area comprise the fastest growing region in the Commonwealth. During the past decade they grew at an average rate of 46% as compared with a State-wide average of 17.2%. Growth rates varied from 5.7% for the City of Falls Church (population 10,772) to 51.3% for Loudoun County (37,150), 65.5% for Fairfax County (455,021), and 121.5% for Prince William County (111,102).

D. In contrast, the City of Norfolk with a population of 307,951 is given under said 1971 House reapportionment act seven House seats (Thirty-ninth district), each of which seats has a population of 43,933. Thus, the Norfolk district and each of such seven seats are overrepresented by 5.4%, although during the last decade Norfolk grew at a rate of only 1%, and although there are included in the total Norfolk population 36,000 naval personnel who are on U.S. naval vessels overseas and are included in the Norfolk total only because their ships berth at the Norfolk Navy Yard. Many of these personnel undoubtedly reside elsewhere in the Commonwealth and in the United States.

E. In further contrast, the City of Chesapeake with a population of 89,580 is given under said 1971 House reapportionment act two House seats (Thirty-eighth district), each of which has a population of 44,790. Thus, the Chesapeake district and each of such seats are overrepresented by 3.6%. In addition, however, under said act Chesapeake shares with the residents of the Cities of Virginia Beach and Portsmouth a third "floater" House seat (Forty-second district). Therefore, the residents of Chesapeake, who are mathematically entitled to 1.9 House seats, will under said act vote for and be represented by three Delegates holding said seats.

XIII

The only rationale put forth for said 1971 House reapportionment act and for the substantial variations of population among the House districts created by it was and is the desire of the General Assembly to avoid placing portions of any county or city in different House districts. However, no provision of the Virginia Constitution or of any statute forbids the division of counties or cities in the course of reapportionment; the refusal of the General Assembly to do so in developing and enacting the 1971 House reapportionment statute was based only on long-standing custom of preserving the territorial integrity of localities. Moreover, this custom has been rejected in the 1971 Senate reapportionment act, which creates 40 single-member Senatorial districts, many of which place portions of counties and cities in different districts; and the custom is even disregarded in the 1971 House reapportionment act itself, which divides Fairfax County between two separate districts (Eighteenth and Nineteenth). Some counties and cities must be divided if House distrcts are to meet the

constitutional test that they all be substantially equal in population.

In enacting said 1971 House reapportionment act, the General Assembly was compelled to depart from the usual pattern that House districts be smaller in population than Senate districts. The eight Northern Virginia Senate districts range in population from 110,938 to 118,058, whereas five out of six Northern Virginia House districts, containing seventeen out of nineteen Northern Virginia House seats, range in population from 148,252 (Twentieth) to 285,222 (Twenty-third).

XIV

Plaintiffs further aver that the establishment by said 1971 House reapportionment act of two five-member House districts, one consisting of the portion of Fairfax County in the Tenth Congressional District and the Cities of Fairfax and Falls Church (Eighteenth) and the other comprising the portion of Fairfax County in the Eighth Congressional District (Nineteenth), and the establishment by said act of a three-member House district comprising the County of Arlington (Twenty-second) and of a one-member "floater" district shared by the County of Arlington and the City of Alexandria (Twenty-third) will result in invidious discrimination against the plaintiffs and other voters residing in said districts and will cause their votes to be less effective than the votes of voters residing in single-member House districts throughout the Commonwealth, in that:

A. The populations of multi-member or "floater" House districts are many times larger than those of single-member House districts. For instance, the Fairfax-Falls Church five-member district (Eighteenth) contains 246,509 per-

sons; the Fairfax five-member district (Nineteenth) contains 241,254 persons; the Arlington three-member district (Twenty-second) contains 174,284 persons; and the Arlington-Alexandria "floater" (Twenty-third) contains 285,222 persons, whereas the ideal single-member House district would contain, as heretofore stated, 46,485 persons. As a result, any potential candidates for House seats, including some of the plaintiffs herein, are deterred from seeking office in multi-member or "floater" districts because of the higher cost of campaigns therein; voters in multi-member districts find it much more difficult and confusing during campaigns and elections to select the best candidates from among large groups of competing office-seekers than would be the case if their choice was to be made between two or three candidates; and after elections, voters in multi-member districts find it more difficult to determine which of a large group of elected Delegates to contact or who would best represent them on political matters than would be the case if they were represented by one Delegate only.

B. In multi-member and floater districts which as in the case of those mentioned above have no subdistrict residence requirements, many or even most voters in such a district may never reside anywhere near any of their Delegates—or they may reside near a large group of them. Under a previous House reapportionment statute, Fairfax County and the Cities of Fairfax and Falls Church were and are represented by six Delegates at large. In four of the last six years, three of such six Delegates or 50% of the total have lived in Dranesville District whose population is approximately 10% of the total population of the House district. During the same period, no Delegates lived in Mount Vernon or Lee Districts, whose population represents about 26% of the total population. Under a previous reapportionment act, Arlington County has since 1965 comprised a

four-member House district. At the present time all four Delegates representing Arlington live in a relatively small portion of North Arlington, north of Lee Highway (State routes 29 and 211). Physical proximity between voters and their legislator, which would more often happen in the case of single-member districts, produce better communication and improved representation of the voters.

C. The large populations of multi-member and "floater" districts submerge the interests of minority racial, political, and other groups of voters within such districts. For instance, the establishment by said 1971 House reapportionment act of the five-member House district consisting of the portion of Fairfax County in the Tenth Congressional District and the small Cities of Fairfax and Falls Church (Eighteenth), will result in invidious discrimination against the plaintiffs and other voters resding in said cities, because of the population imbalance between the County (213,767) and the Cities (Fairfax City, 21,970; Falls Church City, 10,772). The five Delegates to be elected from this district can anticipate receiving some 87% of their votes from the County and 13% from the two Cities. Under such circumstances, on any issue in which the County and Cities are at odds (such as the allocation of State revenues for highways between cities and counties) the five Delegates would undoubtedly vote on the County side of the issue and against the interests of voters residing in said Cities. The creation of five single-member House districts in the place of the proposed five-member House district would give the residents of the two Cities a much stronger voice in the selection and election of candidates for the House. To date, no resident of either City has ever been elected as a member of the House of Delegates.

Similarly, the disparity between the population of the

County of Arlington (174,284) and the City of Alexandria (110,936) which are both contained in one "floater" House district (the Twenty-third) effectively denies to the citizens of Alexandria any representation from the "floater" Delegate on any issue where the interests of the County and City are adverse. Nor is such a huge district of benefit to Arlington, as shown by the opposition to it by the local governing body and spokesmen of both major political parties.

XV

Plaintiffs aver that when all of the many inequalities in the above mentioned reapportionment statute are considered together, they result in a distortion of the constitutional system as established, defined and guaranteed by the Fourteenth Amendment to the Constitution of the United States, and that this distortion denies to plaintiffs the equal protection of the laws.

XVI

Plaintiffs aver that the constitutional requirements aforementioned can only be met by a revision of the 1971 House reapportionment act so as to reapportion House districts and seats among the Counties and Cities of Northern Virginia hereinbefore mentioned in fairer proportion to their respective populations and to allot them one additional House seat, and so as to reapportion Fairfax County and Arlington County, respectively, into single-member districts shared as necessary with neighboring juridictions, in place of the above described multi-member districts and "floater" district as proposed under the 1971 act.

XVII

The special session of the General Assembly of Virginia which was held in January and February of this year, has

adjourned until March 29, 1971, and then or thereafter may adjourn to a later date. In the meantime, there will be a primary election throughout the Commonwealth for members of the House of Delegates on June 8, 1971, and unless the inequities herein complained of are corrected by this Court, the plaintiffs and all other voters similarly situated will be denied the equal protection of the laws in said elections. The defendants, unless prevented by this Court will perform their duties in the conduct of such elections in an unconstitutional manner.

Wherefore, plaintiffs pray:

1. That this Court may take jurisdiction of this controversy.

2. That a special three-judge court be called and impanelled to hear and determine this action and to declare the rights of plaintiffs in the premises to be as follows:

A. That the reapportionment of House districts in the Commonwealth of Virginia made by Section 24.1-12.1 of the Code of Virginia denies the plaintiffs and other voters of the Commonwealth similarly situated the equal protection of the laws, in contravention of the Fourteenth Amendment of the Constitution of the United States.

B. That said Section 24.1-12.1, as now in force, insofar as it applies to the Counties of Fairfax, Arlington, Prince William and Loudoun and the Cities of Fairfax, Falls Church and Alexandria is unconstitutional and void.

3. That upon final hearing of this action, the Court grant to the plaintiffs the following further relief:

A. That the defendants and each of them be permanently restrained and enjoined from furnishing forms

for nominations, from receiving the names of candidates, notices of candidacy or petitions therefor, from ordering or conducting the Primary election scheduled to be held on June 8, 1971, or the General election scheduled to be held on November 2, 1971, from certifying the results of either such election, and from taking any and all other steps with respect to the election of members of the House of Delegates of the Commonwealth of Virginia under and pursuant to Code Section 24.1-12.1, until there has been a further reapportionment of House districts in accordance with constitutional requirements as approved or promulgated by this Court.

B. That this Court notify the Speaker of the House of Delegates and the President of the Senate of the General Assembly of Virginia as well as the defendants herein, of its decision and opinion so that when the General Assembly reconvenes on March 29, 1971, or is called back into session at a later date it will be afforded a reasonable opportunity to enact legislation amending or repealing the 1971 House redistricting statute and reapportioning the several House districts and seats among the above mentioned Counties and Cities of Northern Virginia in accordance with constitutional requirements and the decision and opinion of this Court.

C. That this Court retain jurisdiction of this cause until such time as the General Assembly amends the 1971 House reapportionment act or enacts new reapportionment legislation in accordance with constitutional requirements; that it hold further hearings to determine the validity of such amended or new apportionment legislation; and that in the absence of enactment by the General Assembly of a valid new House reapportionment act by June 1, 1971, this Court retain jurisdiction and hold

hearings in order to promulgate an apportionment plan for the House of Delegates which meets constitutional requirements.

D. That this Court enjoin and postpone the holding of the Primary election for members of the House of Delegates scheduled to be held on June 8, 1971 (and hence also postpone the deadline of April 9, 1971, for filing notices of candidacy and petitions therefor) until an appropriate date subsequent to a reapportionment of House districts in accordance with constitutional requirements as approved or promulgated by this Court.

4. That the plaintiffs may have such further and alternative relief as the nature of this action may require and this Court may deem proper.

Edmund D. Campbell
2000 North 16th Street
Arlington, Virginia 22216
Attorney for Plaintiffs
Tel. No. (202) 783-7151

ANSWER

Now comes the Attorney General of Virginia, Andrew P. Miller, as counsel for defendants Edgar A. Prichard, Member, State Board of Elections; Joan S. Mahan, Secretary, State Board of Elections; Ulysses P. Joyner, Jr., Chairman, State Board of Elections; A. Linwood Holton, Governor of Virginia; and Andrew P. Miller, Attorney General of Virginia, and in response to the Complaint filed herein answers and says:

First Defense

The Governor and Attorney General of the Commonwealth of Virginia do not threaten plaintiffs or any other

person with the operation, enforcement or execution of any law, nor has a cause of action been stated against said defendants. The requirement that said defendants be served notice pursuant to 28 U.S.C. § 2284 is not sufficient basis to make them parties to the action. They are therefore neither a necessary nor a proper party to this suit and should be dismissed.

Second Defense

The Complaint fails to state a claim upon which relief can be granted.

Third Defense

This Court is without jurisdiction to entertain the instant suit inasmuch as it presents a non-justiciable question.

Fourth Defense

In response to the allegations in the Complaint, defendants:

(a) Deny the allegation of Paragraph I of the Complaint.

(b) Admit the allegations of Paragraphs II, III and IV of the Complaint, except that they deny that the Attorney General and Governor are necessary and proper parties.

(c) Deny the allegations of Paragraph V of the Complaint.

(d) Aver the allegations contained in Paragraphs VI, VII, VIII, IX and X of the Complaint are conclusions of law and do not call for an answer, except that defendants deny the relevancy of those facts in Paragraphs IX and XI relating to those House seats either five percent above or below the optimum population.

(e) Deny as to the remaining allegations in Paragraph XI of the Complaint that the act therein referred to creates substantial and constitutionally impermissible variations of population within its House Districts.

(f) Admit that all of the citizens of the Commonwealth of Virginia have an inherent right to cast votes the weight of which is as near as practicable to the weight of the vote of all other citizens of the Commonwealth of Virginia, but they deny that the reapportionment statutes adopted by the General Assembly in 1971 invidiously discriminate against the plaintiffs or any other citizens of the Commonwealth by denying them this right; and they further state that the allegations of sub-paragraph (c) of Paragraph XII of the Complaint are irrelevant to a consideration of the Complaint.

(g) With regard to the allegations of Paragraph XIII of the Complaint, defendants state that this is a matter of political policy to be determined by the Legislature of the Commonwealth of Virginia and that such consideration is beyond the jurisdiction of this Court.

(h) Deny the allegations of Paragraphs XIV, XV and XVI of the Complaint.

(i) Admit the allegations of Paragraph XVII of the Complaint, except that defendants deny that any inequities in the reapportionment statute exist which would deny the plaintiffs and any other voters in the Commonwealth equal protection of the laws as the result of any elections held as a result of said statute, nor that they will conduct any elections pursuant to the said statutes in an unconsitutional manner.

Wherefore, having fully answered, and any allegations not answered are deemed to be denied, defendants pray that they be dismissed with their costs herein.

COMMONWEALTH OF VIRGINIA
OFFICE OF THE GOVERNOR

COMMONWEALTH OF VIRGINIA
OFFICE OF THE GOVERNOR

Division of State Planning
and Community Affairs
Charles H. Graves
Director

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1010 James Madison Building
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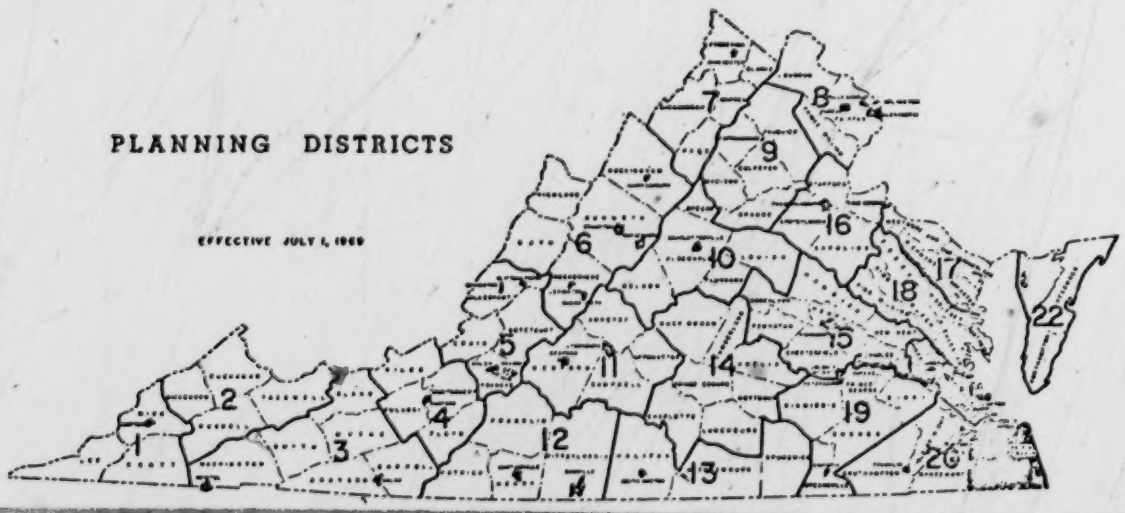
Statistical Information Series No. 71-1

March, 1971

POPULATION PROJECTIONS TO 1980, 1990, 2000, 2010, AND 2020 FOR VIRGINIA COUNTIES, CITIES, AND PLANNING DISTRICTS[a/]

Note: The statewide population projections to year 2020 were revised in light of the population figures obtained from the 1970 Census of Population and Housing. The projections are based on the fertility assumptions of Census Series D. Insight gained through the Economic Base Analysis and Projections Series Program of the Office of Research and Information in the Division of State Planning and Community Affairs and such factors as the present and historical general economic condition of each county and city; industrial development considerations; present and planned highway, air, and rail facilities; recreational, commercial and residential development; land use and settlement patterns; population density considerations; natural increase rates; and migration rates were used in developing the projections. These provisional projections are subject to change as new economic base studies are prepared for all Virginia counties and cities.

As with all projections, it should be realized that the longer the time period involved, the more likely the chance of error. Therefore greater reliability should be placed on the 1980 projections than on the projections beyond -- to year 2020.



POPULATION PROJECTIONS TO 1980, 1990, 2000, 2010, AND 2020, FOR VIRGINIA COUNTIES, CITIES, AND PLANNING DISTRICTS[a/]

	Actual (Census)		Projections					Average Annual Rates of Change					
	1960	1970	1980[b/]	1990	2000	2010	2020	1960-70	1970-80	1980-90	1990-2000	2000-2010	2010-2020
State of Virginia	3,954,429	4,648,494	5,415,000	6,284,000	7,222,000	8,217,000	9,350,000	+1.6	+1.5	+1.4	+1.4	+1.3	+1.3
Planning District One	100,212	84,645	74,800	70,000	67,900	66,800	66,800	-1.7	-1.2	-0.6	-0.3	-0.1	*
LENOWISCO PDC													
Lee County	25,824	20,321	17,000	15,000	14,000	13,500	13,500	-2.3	-1.8	-1.2	-0.6	-0.3	*
Scott County	25,813	24,376	23,800	24,000	24,500	25,000	25,000	-0.5	-0.2	*	+0.2	+0.2	*
Wise County	43,562	35,947	30,400	27,500	26,000	25,000	25,000	-1.9	-1.6	-1.0	-0.5	-0.4	*
Norton City	5,013	4,001	3,600	3,500	3,400	3,300	3,300	-2.2	-1.0	-0.2	-0.2	-0.2	*
Planning District Two	128,016	112,497	100,700	92,000	86,000	83,000	82,500	-1.3	-1.1	-0.9	-0.6	-0.3	*
Cumberland Plateau PDC													
Buchanan County	36,724	32,071	28,900	26,300	24,500	24,000	24,000	-1.3	-1.0	-0.9	-0.7	-0.2	*
Dickenson County	20,211	16,077	13,000	10,800	9,500	8,500	8,000	-2.2	-2.1	-1.6	-1.3	-1.1	-0.6
Russell County	26,290	24,533	22,800	21,400	20,500	20,000	20,000	-0.6	-0.7	-0.6	-0.4	-0.2	*
Tazewell County	44,791	39,816	36,000	33,500	31,500	30,500	30,500	-1.1	-1.0	-0.7	-0.6	-0.3	*
Planning District Three	160,065	159,412	162,300	168,000	178,000	190,000	205,000	*	+0.2	+0.3	+0.5	+0.6	+0.7
Mount Rogers PDC													
Bland County	5,982[c/]	5,423	5,000	4,700	4,500	4,400	4,300	-0.9	-0.8	-0.6	-0.4	-0.2	-0.2
Carroll County	22,746[c/]	23,092	23,500	23,800	24,500	25,200	26,000	+0.1	+0.1	+0.1	+0.2	+0.2	+0.3
Grayson County	16,540[c/]	15,439	14,600	14,000	13,600	13,300	13,300	-0.6	-0.5	-0.4	-0.2	-0.1	*
Smyth County	31,066	31,349	32,000	33,000	35,000	37,400	40,400	+0.1	+0.2	+0.3	+0.5	+0.6	+0.7
Washington County	38,076	40,835	44,600	49,800	57,000	65,500	76,000	+0.7	+0.8	+1.1	+1.3	+1.4	+1.5
Wythe County	21,975	22,139	22,500	23,000	23,800	24,700	25,500	+0.1	+0.2	+0.2	+0.3	+0.3	+0.3
Bristol City	17,144	14,857	14,000	13,700	13,600	13,500	13,500	-1.6	-0.6	-0.2	*	*	*
Galax City	6,536[c/]	6,278	6,100	6,000	6,000	6,000	6,000	-0.4	-0.2	-0.1	*	*	*
Planning District Four	97,233	114,833	135,500	158,500	182,000	208,000	236,000	+1.7	+1.7	+1.5	+1.4	+1.3	+1.2
New River Valley PDC													
Floyd County	10,462	9,775	9,300	9,000	9,000	9,100	9,200	-0.6	-0.5	-0.3	*	+0.1	+0.1
Giles County	17,219	16,741	16,600	16,500	16,500	16,500	16,500	-0.3	-0.1	*	*	*	*
Montgomery County	32,923	47,157	64,600	83,600	102,500	123,200	146,000	+3.7	+3.2	+2.6	+2.0	+1.8	+1.7
Pulaski County	27,258	29,564	32,500	36,200	40,000	44,600	49,300	+0.8	+1.0	+1.0	+1.0	+1.0	+1.0
Radford City	9,371	11,596	12,500	13,200	14,000	14,600	15,000	+2.1	+0.6	+0.5	+0.5	+0.4	+0.2
Planning District Five	207,332	231,175	258,900	289,500	322,000	358,000	400,000	+1.1	+1.2	+1.1	+1.0	+1.0	+1.0
Fifth PDC													
Alleghany County	11,651	12,461	13,000	13,800	14,800	15,700	16,700	+0.3	+0.4	+0.6	+0.6	+0.6	+0.6
Botetourt County	16,715	18,193	20,000	22,800	26,200	30,400	35,300	+0.9	+1.0	+1.3	+1.3	+1.5	+1.5
Craig County	3,356	3,524	3,700	4,000	4,500	5,100	5,800	+0.5	+0.5	+0.7	+1.1	+1.2	+1.2
Roanoke County[b/]	45,635	67,339	90,000	112,000	234,500	158,000	185,200	+4.0	+2.9	+2.0	+1.8	+1.6	+1.6
Clifton Forge City	5,745	5,501	5,500	5,500	5,500	5,500	5,500	-0.4	*	*	*	*	*
Covington City	11,062	10,060	9,500	9,200	9,000	9,000	9,000	-0.9	-0.5	-0.3	-0.2	*	*
Roanoke City	97,110	92,115	89,000	87,000	85,500	85,000	85,000	-0.5	-0.3	-0.2	-0.1	-0.1	*
Salem City[b/]	16,058	21,982	28,200	35,200	42,000	49,300	57,500	+3.2	+2.5	+2.2	+1.8	+1.6	+1.5

PLAINTIFFS' (DuVAL) EXHIBIT 25

POPULATION PROJECTIONS TO 1980, 1990, 2000, 2010, AND 2020, FOR VIRGINIA COUNTIES, CITIES, AND PLANNING DISTRICTS[a/] (Cont.)

	Actual (Census)		Projections					Average Annual Rates of Change					
	1960	1970	1980[b/]	1990	2000	2010	2020	1960-70	1970-80	1980-90	1990-2000	2000-2010	2010-2020
Planning District Six	166,585	186,306	205,900	226,500	246,000	267,000	287,000	+1.1	+1.0	+0.9	+0.8	+0.8	+0.7
Central Shenandoah PDC													
Augusta County	37,363	44,220	51,000	58,500	65,900	74,300	82,000	+1.7	+1.5	+1.3	+1.2	+1.2	+1.0
Bath County	5,335	5,192	5,000	4,800	4,700	4,600	4,600	-0.3	-0.3	-0.4	-0.2	-0.2	*
Highland County	3,221	2,529	2,200	2,000	1,900	1,800	1,800	-2.3	-1.2	-0.9	-0.5	-0.5	*
Rockbridge County	16,502	16,637	17,000	17,500	18,000	18,700	19,600	+0.1	+0.2	+0.2	+0.3	+0.4	+0.5
Rockingham County	39,559	47,890	55,000	61,600	68,000	75,000	81,200	+1.7	+1.4	+1.1	+1.0	+1.0	+0.8
Buena Vista City	6,300	6,425	6,600	6,800	7,100	7,400	7,700	+0.2	+0.3	+0.3	+0.4	+0.4	+0.4
Harrisonburg City	12,842	14,605	16,800	18,800	20,400	22,000	23,400	+2.1	+1.4	+1.1	+0.8	+0.7	+0.6
Lexington City	7,537	7,597	7,800	8,000	8,100	8,200	8,300	+0.1	+0.3	+0.2	+0.1	+0.1	+0.1
Staunton City	22,232	24,504	27,000	30,000	32,500	34,800	37,000	+1.0	+1.0	+1.0	+0.8	+0.7	+0.6
Waynesboro City	15,694	16,707	17,500	18,500	19,400	20,400	21,400	+0.6	+0.5	+0.5	+0.5	+0.5	+0.5
Planning District Seven	97,045	106,372	117,000	128,800	142,000	156,000	172,000	+0.9	+1.0	+0.9	+0.9	+0.9	+0.9
Lord Fairfax PDC													
Clarke County	7,942	8,102	8,300	8,500	8,700	9,000	9,300	+0.2	+0.2	+0.2	+0.2	+0.3	+0.3
Frederick County[d/]	21,941	28,893	28,700	33,400	39,200	45,500	52,800	+2.8	*	+1.5	+1.6	+1.5	+1.5
Page County	15,572	16,581	17,500	18,500	19,400	20,400	21,500	+0.6	+0.6	+0.5	+0.5	+0.5	+0.5
Shenandoah County	21,825	22,852	24,000	25,400	26,800	28,200	29,600	+0.5	+0.5	+0.5	+0.5	+0.5	+0.5
Warren County	14,655	15,301	16,000	17,000	18,000	19,100	20,400	+0.4	+0.5	+0.6	+0.6	+0.6	+0.6
Winchester City[d/]	15,110	14,643	22,500	26,000	29,900	34,000	38,400	-0.3	+4.4	+1.4	+1.4	+1.3	+1.2
Planning District Eight	601,808	921,237	1,256,300	1,625,500	2,030,300	2,434,600	2,908,600	+4.4	+3.1	+2.6	+2.2	+1.8	+1.8
Northern Virginia PDC													
Arlington County	163,401	174,284	191,700	210,000	223,000	232,100	241,600	+0.6	+1.0	+0.9	+0.6	+0.4	+0.4
Fairfax County	248,897	455,021	636,000	852,000	1,080,300	1,306,900	1,566,000	+6.2	+3.4	+2.9	+2.4	+1.8	+1.8
Loudoun County	24,549	37,150	75,000	125,000	192,100	271,000	378,600	+4.2	+7.3	+5.2	+4.3	+3.5	+3.4
Prince William County	50,164	111,102	180,000	240,000	304,300	370,900	452,100	+8.3	+5.0	+2.9	+2.4	+2.0	+2.0
Alexandria City	91,023	110,938	132,100	154,000	170,200	184,300	193,700	+2.0	+1.7	+1.5	+1.0	+0.8	+0.5
Fairfax City	13,585	21,970	30,000	38,000	46,300	53,800	59,400	+4.9	+3.2	+2.3	+2.0	+1.5	+1.0
Falls Church City	10,192	10,772	11,500	12,800	14,100	15,600	17,200	+0.6	+0.7	+1.0	+1.0	+1.0	+1.0
Planning District Nine	65,609	72,222	81,300	93,000	107,000	124,000	144,000	+1.0	+1.2	+1.5	+1.4	+1.4	+1.5
Rappahannock-Rapidan PDC													
Culpeper County	15,088	18,218	21,500	25,000	28,700	32,700	36,800	+1.9	+1.7	+1.5	+1.4	+1.3	+1.2
Fauquier County	24,066	26,375	31,000	37,500	46,200	57,400	71,300	+0.9	+1.6	+2.0	+2.1	+2.2	+2.2
Madison County	8,187	8,638	9,100	9,600	10,100	10,600	11,100	+0.5	+0.6	+0.5	+0.5	+0.5	+0.5
Orange County	12,900	13,792	14,600	15,800	16,900	18,100	19,400	+0.7	+0.7	+0.7	+0.7	+0.7	+0.7
Rappahannock County	5,368	5,199	5,100	5,100	5,100	5,200	5,400	-0.3	-0.2	*	*	+0.1	-0.3
Planning District Ten	98,049	115,235	132,500	152,400	174,000	198,500	224,000	+1.6	+1.4	+1.4	+1.3	+1.3	+1.2
Thomas Jefferson PDC													
Albemarle County	26,583	37,780	45,400	55,000	65,700	77,800	92,500	+2.0	+1.9	+1.9	+1.8	+1.7	+1.7
Fluvanna County	7,227	7,621	8,000	8,500	9,100	9,900	10,800	+0.5	+0.5	+0.6	+0.7	+0.8	+0.8
Greene County	4,715	5,248	5,900	6,800	8,000	9,400	11,200	+1.1	+1.2	+1.4	+1.5	+1.6	+1.7
Louisa County	12,959	14,004	15,500	17,500	20,000	23,000	26,500	+0.8	+1.0	+1.2	+1.3	+1.4	+1.4
Nelson County	12,752	11,702	11,000	10,600	10,200	10,000	10,000	-0.8	-0.6	-0.3	-0.3	-0.1	*
Charlottesville City	33,813	38,880	46,700	54,000	61,000	67,400	73,000	+2.8	+1.9	+1.4	+1.2	+1.0	+0.8

PLAINTIFFS' (DuVAL) EXHIBIT 25

POPULATION PROJECTIONS TO 1980, 1990, 2000, 2010, AND 2020, FOR VIRGINIA COUNTIES, CITIES, AND PLANNING DISTRICTS[a] (Cont.)

	Actual (Census)		Projections					Average Annual Rates of Change					
	1960	1970	1980[b]	1990	2000	2010	2020	1960-70	1970-80	1980-90	1990-2000	2000-2010	2010-2020
Planning District Eleven	150,877	165,997	182,600	201,900	221,000	243,000	268,000	+1.0	+1.0	+1.0	+0.9	+0.9	+0.9
Central Virginia PDC													
Amherst County	22,953	26,072	29,500	33,500	37,400	41,300	45,600	+1.3	+1.3	+1.2	+1.1	+1.0	+1.0
Appomattox County	9,148[c]	9,784	10,500	11,600	12,800	14,300	16,100	+0.7	+0.7	+0.9	+1.0	+1.1	+1.2
Bedford County	25,107[c]	26,728	28,000	29,500	30,700	32,200	33,800	+0.6	+0.5	+0.4	+0.4	+0.4	+0.4
Campbell County	32,958	43,319	55,000	68,000	81,200	96,500	114,000	+2.8	+2.4	+2.1	+1.8	+1.7	+1.6
Bedford City	5,921[c]	6,011	6,100	6,300	6,400	6,500	6,500	+0.2	+0.2	+0.3	+0.1	+0.1	*
Lynchburg City	54,790	54,083	53,500	53,000	52,500	52,200	52,000	-0.1	-0.1	-0.1	-0.1	*	*
Planning District Twelve	205,213	217,874	232,900	252,000	272,000	294,000	317,000	+0.6	+0.7	+0.7	+0.7	+0.7	+0.7
West Piedmont PDC													
Franklin County	25,925	26,858	27,900	29,500	31,200	33,100	35,200	+0.4	+0.4	+0.5	+0.5	+0.6	+0.6
Henry County	40,335	50,901	62,000	74,800	87,500	101,600	116,500	+2.4	+2.0	+1.8	+1.5	+1.5	+1.4
Patrick County	15,282	15,282	15,500	16,000	16,700	17,400	18,100	*	+0.1	+0.3	+0.4	+0.4	+0.4
Pittsylvania County	58,296	58,789	60,000	62,000	64,500	67,800	71,300	+0.1	+0.2	+0.3	+0.4	+0.5	+0.5
Danville City	46,577	46,391	46,500	47,000	47,500	48,000	48,500	*	*	+0.1	+0.1	+0.1	+0.1
Martinsville City	18,798	19,653	21,000	22,700	24,600	26,100	27,400	+0.4	+0.7	+0.8	+0.8	+0.6	+0.5
Planning District Thirteen	88,818	82,563	79,100	78,000	77,000	78,000	78,800	-0.7	-0.4	-0.1	-0.1	+0.1	+0.1
Southside PDC													
Brunswick County	17,779	16,172	15,200	14,800	14,500	14,500	14,600	-0.9	-0.6	-0.2	+0.2	*	*
Halifax County	32,864[c]	30,076	28,500	27,700	27,500	27,700	28,000	-0.8	-0.5	-0.2	*	*	*
Mecklenburg County	31,428	29,426	28,500	28,500	28,600	28,800	29,000	-0.6	-0.3	*	*	*	*
South Boston City	6,747[c]	6,889	6,900	7,000	7,000	7,000	7,200	+0.2	*	+0.1	*	*	+0.2
Planning District Fourteen	80,205	76,245	75,000	75,000	75,300	76,000	77,000	-0.5	-0.2	*	*	*	+0.1
Piedmont PDC													
Amelia County	7,815	7,592	7,600	8,000	8,500	9,000	9,700	-0.3	-0.1	+0.5	+0.6	+0.6	+0.8
Buckingham County	10,877	10,597	10,400	10,300	10,200	10,100	10,000	-0.3	-0.2	-0.1	-0.1	*	*
Charlotte County	13,368	11,551	10,800	10,200	9,800	9,500	9,200	-1.3	-0.6	-0.5	-0.4	-0.3	-0.3
Cumberland County	6,360	6,179	6,000	5,800	5,600	5,500	5,400	-0.3	-0.3	-0.3	-0.3	-0.1	-0.1
Lunenburg County	12,523	11,687	11,400	11,200	11,000	10,800	10,700	-0.7	-0.2	-0.1	-0.1	-0.1	*
Nottoway County	15,141	14,260	14,000	14,000	14,100	14,200	14,200	-0.6	-0.2	*	*	*	*
Prince Edward County	14,121	14,379	14,800	15,500	16,100	16,900	17,800	+0.2	+0.3	+0.4	+0.4	+0.5	+0.5
Planning District Fifteen	461,993	547,542	649,100	764,000	883,000	1,010,000	1,150,000	+1.7	+1.7	+1.6	+1.4	+1.3	+1.3
Richmond Regional PDC													
Charles City County	5,492	6,158	7,100	8,300	9,800	11,600	13,800	+1.2	+1.4	+1.5	+1.6	+1.7	+1.8
Chesterfield County	43,855[c]	76,855	100,000	135,000	178,000	227,800	283,700	+5.8	+2.7	+3.0	+2.8	+2.5	+2.2
Goochland County	9,206	10,069	15,000	22,000	31,300	42,800	56,500	+0.9	+4.1	+3.9	+3.6	+3.2	+2.8
Hanover County	27,550	37,479	52,500	70,000	88,800	108,200	130,000	+3.1	+3.4	+2.9	+2.4	+2.0	+2.0
Henrico County	117,339	154,364	193,000	230,000	264,400	298,000	330,000	+2.8	+2.1	+1.7	+1.4	+1.2	+1.0
New Kent County	4,504	5,300	6,500	8,500	11,200	14,900	20,000	+1.6	+2.1	+2.7	+2.8	+2.9	+3.0
Powhatan County	6,747	7,696	10,000	14,000	19,500	26,700	36,000	+1.3	+2.7	+3.4	+3.4	+3.2	+3.0
Richmond City	247,300[c]	249,621	265,000	276,000	280,000	280,000	280,000	+0.1	+0.6	+0.4	+0.1	*	*

PLAINTIFFS' (DuVAL) EXHIBIT 25

POPULATION PROJECTIONS TO 1980, 1990, 2000, 2010, AND 2020, FOR VIRGINIA COUNTIES, CITIES, AND PLANNING DISTRICTS[a/] (Cont.)

	Actual (Census)		Projections					Average Annual Rates of Change					
	1960	1970	1980[b/]	1990	2000	2010	2020	1960-70	1970-80	1980-90	1990-2000	2000-2010	2010-2020
Planning District Sixteen	64,302	77,425	93,400	113,000	134,000	157,600	183,300	+1.9	+1.9	+1.9	+1.7	+1.6	+1.5
RADCO PDC													
Caroline County	12,725	13,925	15,500	17,500	18,500	21,300	24,000	+0.9	+1.1	+1.2	+1.3	+1.2	+1.2
King George County	7,243	8,039	9,200	10,500	11,900	13,400	15,200	+1.1	+1.4	+1.3	+1.2	+1.2	+1.2
Spotsylvania County	13,819	16,424	20,500	25,000	30,000	35,200	40,900	+1.8	+2.2	+2.0	+1.8	+1.6	+1.5
Stafford County	16,876	24,587	33,600	44,000	57,000	70,800	86,000	+3.8	+3.0	+2.9	+2.6	+2.2	+1.9
Fredericksburg City	13,639	14,450	15,200	16,000	16,600	16,900	17,200	+0.6	+0.5	+0.5	+0.3	+0.2	+0.2
Planning District Seventeen	36,776	37,011	37,700	38,900	40,200	41,500	43,000	*	+0.1	+0.3	+0.3	+0.3	+0.3
Northern Neck PDC													
Lancaster County	9,174	9,126	9,100	9,100	9,100	9,100	9,100	*	*	*	*	*	*
Northumberland County	10,185	9,239	8,600	8,200	8,000	7,900	7,800	-0.9	-0.7	-0.4	-0.2	-0.1	-0.1
Richmond County	6,375	6,504	6,700	7,000	7,300	7,600	7,900	+0.2	+0.3	+0.4	+0.4	+0.4	+0.4
Westmoreland County	11,042	12,142	13,300	14,600	15,800	16,900	18,200	+1.0	+1.0	+0.9	+0.8	+0.7	+0.6
Planning District Eighteen	45,501	47,609	50,800	54,800	59,000	64,000	70,000	+0.5	+0.7	+0.7	+0.7	+0.8	+0.9
(Not yet organized)													
Essex County	6,690	7,099	7,700	8,500	9,400	10,400	11,600	+0.6	+0.8	+0.9	+1.0	+1.0	+1.0
Gloucester County	11,919	14,059	17,000	20,200	23,400	27,000	31,000	+1.7	+1.9	+1.7	+1.5	+1.4	+1.4
King and Queen County	5,889	5,491	5,200	5,000	4,800	4,800	4,800	-0.7	-0.5	-0.4	-0.4	*	*
King William County	7,563	7,497	7,400	7,500	7,600	7,800	8,200	-0.1	-0.1	+0.1	+0.1	+0.1	+0.4
Mathews County	7,121	7,168	7,200	7,300	7,400	7,500	7,700	*	*	+0.1	+0.1	+0.1	+0.2
Middlesex County	6,319	6,295	6,300	6,300	6,400	6,500	6,700	*	*	*	+0.1	+0.1	+0.2
Planning District Nineteen	141,471	161,059	177,800	198,500	220,000	245,000	272,000	+1.3	+1.0	+1.0	+1.0	+1.0	+1.0
Crater PDC													
Dinwiddie County[f/]	22,183	25,046	23,100	26,000	29,000	32,800	37,000	+1.2	-0.7	+1.1	+1.1	+1.2	+1.2
Greensville County	10,620[c/]	9,604	9,000	8,500	8,100	8,000	8,000	-0.9	-0.9	-0.5	-0.4	-0.3	*
Prince George County[f/]	20,270	29,092	28,000	36,000	46,000	58,500	72,600	+3.7	-0.4	+2.5	+2.5	+2.4	+2.2
Surry County	6,220	5,882	5,600	5,500	5,400	5,400	5,400	-0.5	-0.5	-0.1	-0.1	*	*
Sussex County	12,411	11,464	11,200	11,000	11,000	11,000	11,200	-0.7	-0.2	-0.1	*	*	+0.1
Colonial Heights City	9,587	15,097	20,000	24,000	28,200	32,800	37,600	+4.7	+2.9	+1.8	+1.6	+1.5	+1.4
Emporia City	5,535[c/]	5,300	5,100	5,000	4,900	4,800	4,800	-0.4	-0.4	-0.2	-0.2	-0.2	*
Hopewell City	17,895	23,471	25,800	27,500	28,900	30,200	31,400	+2.8	+1.0	+0.6	+0.5	+0.4	+0.4
Petersburg City[f/]	36,750	36,103	50,000	55,000	58,500	61,500	64,000	-0.2	+3.3	+0.9	+0.6	+0.5	+0.4
Planning District Twenty	666,841	769,371	871,200	983,000	1,103,000	1,235,000	1,384,000	+1.4	+1.3	+1.2	+1.1	+1.1	+1.1
Southeastern Virginia PDC													
Isle of Wight County	17,164	18,285	20,000	23,000	26,700	31,200	36,600	+0.6	+1.0	+1.4	+1.5	+1.6	+1.6
Nansemond County	31,366	35,166	40,000	46,000	53,400	62,000	72,000	+1.2	+1.3	+1.4	+1.5	+1.5	+1.5
Southampton County[c/]	19,931	18,582	18,000	17,500	17,000	16,800	16,800	-0.7	-0.3	-0.2	-0.2	*	*
Chesapeake City[c/]	73,647	89,580	110,000	132,000	155,000	178,000	200,600	+2.0	+2.1	+1.8	+1.6	+1.4	+1.2
Franklin City[c/]	7,264	6,880	6,700	6,500	6,400	6,400	6,400	-0.5	-0.3	-0.3	-0.1	*	*
Norfolk City	304,869	307,951	311,000	312,000	311,000	310,000	310,000	+0.1	+0.1	*	*	*	*
Portsmouth City	114,773	110,963	109,000	107,500	106,500	106,000	105,000	-0.3	-0.2	-0.1	*	*	*
Suffolk City	12,609	9,858	9,000	8,500	8,200	8,000	8,000	-2.0	-0.9	-0.5	-0.3	-0.2	*
Virginia Beach City[c/]	85,218	172,106	247,500	330,000	418,800	516,600	628,600	+7.3	+3.7	+2.9	+2.4	+2.2	+2.0

PLAINTIFFS' (DuVAL) EXHIBIT 25

POPULATIONS PROJECTIONS TO 1980, 1990, 2000, 2010, AND 2020, FOR VIRGINIA COUNTIES, CITIES, AND PLANNING DISTRICTS[a/] (Cont.)

	Actual (Census)		Projections					Average Annual Rates of Change					
	1960	1970	1980[b/]	1990	2000	2010	2020	1960-80	1970-80	1980-90	1990-2000	2000-2010	2010-2020
Planning District Twenty-one Peninsula PDC	242,874	319,081	400,000	480,000	562,000	647,000	740,000	+2.8	+2.3	+1.8	+1.5	+1.4	+1.3
James City County[c/]	10,449	17,853	24,000	32,000	42,200	54,000	67,000	+5.5	+3.0	+2.9	+2.8	+2.5	+2.2
York County[c/]	21,143	33,203	50,000	72,000	98,600	132,500	178,000	+4.4	+4.2	+3.7	+3.4	+3.0	+3.0
Hampton City	89,258	120,779	150,000	175,000	197,200	217,900	236,000	+3.1	+2.2	+1.5	+1.2	+1.0	+0.8
Newport News City	113,662	138,177	166,000	190,000	212,000	229,600	245,000	+2.0	+1.9	+1.3	+1.1	+0.8	+0.6
Williamsburg City[c/]	8,362	9,069	10,000	11,000	12,000	13,000	14,000	+0.8	+1.0	+0.9	+0.9	+0.8	+0.8
Planning District Twenty-two (Not yet named)	47,601	43,446	41,500	40,700	40,300	40,000	41,000	-0.9	-0.4	-0.1	*	*	+0.2
Accomack County	30,635	29,004	28,000	27,500	27,300	27,000	27,500	-0.5	-0.3	-0.1	*	*	+0.1
Northampton County	16,966	14,442	13,500	13,200	13,000	13,000	13,500	-1.4	-0.6	-0.2	-0.1	*	+0.3

Note: Due to rounding there are slight differences between growth rates of the localities and the growth rates of the planning district totals; * = less than 0.1 percent but greater than -0.1 percent.

a/ It is assumed that the present city and county boundaries will remain the same.

b/ The 1980 population projections are provisional and subject to change as economic base studies are completed or revised.

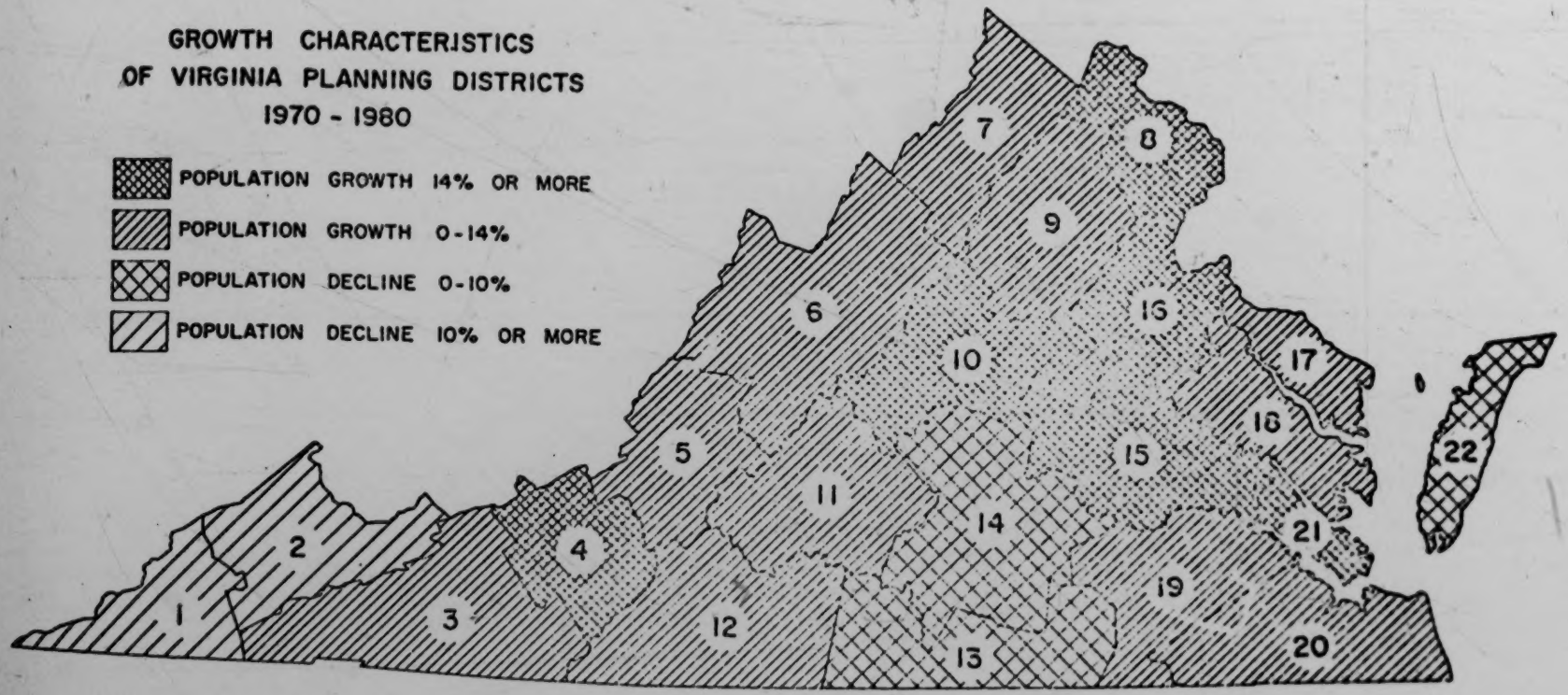
c/ The 1960 population figures have been adjusted in order to reflect annexations and the creation of independent cities during the 1960 to 1970 period.

d/ Adjustments have been made in the Frederick County and Winchester City population projections. Effective January 1, 1971, the county of Frederick annexed 5.9 square miles and approximately 4,900 residents from the city of Winchester. The 1960 and 1970 Frederick County and Winchester City figures have not been altered.

e/ Adjustments have been made in the Richmond City and Chesterfield County population figures for both 1960 and 1970 to allow for the January 1, 1970 annexation of 47,262 Chesterfield County residents by the City of Richmond.

f/ Adjustments have been made in the Dinwiddie County, Prince George County and Petersburg City population projections. To become effective, if upheld on a possible appeal, the city will gain 14.12 square miles of territory from the two counties. The Petersburg City population will be increased by approximately 9,000 persons, 5,500 of which will come from Prince George County and 3,500 from Dinwiddie County. The 1960 and 1970 Prince George County, Dinwiddie County and Petersburg City figures have not been altered.

PLAINTIFFS' (DuVAL) EXHIBIT 25



PLAINTIFFS' (DeVAL) EXHIBIT 25

PLAINTIFFS' (DuVAL) EXHIBIT 26

Comparison of 1971 Representation of Northern Virginia[1] Under Congressional, Virginia Senate and Virginia House of Delegates Reapportionment and By Percentage of Population

Northern Virginia Congressional Seats	Total Virginia Congressional Seats	Northern Virginia Percentage
2 (8th and 10)	10	20

Northern Virginia Senate Seats	Total Virginia Senate Seats	Northern Virginia Percentage
8 (29th-36th, inclusive)	40	20

Northern Virginia House of Delegates	Total Virginia House of Delegates Seats	Northern Virginia Percentage
19 (18th-23rd, inclusive)	100	19

Total Northern Virginia 1970 Population as a Percentage of Total Virginia

$$\frac{\text{Northern Virginia}}{\text{Total Virginia}} \quad \frac{921{,}237}{4{,}648{,}494} \times 100 = 19.82\%$$

[1] Northern Virginia is defined as the Cities of Alexandria, Falls Church and Fairfax, and the Counties of Arlington, Fairfax, Loudoun and Prince William.

PLAINTIFFS' (DuVAL) EXHIBIT 30

Summary of Statistical Data of Virginia's 1971 Legislative Redistricting

Total State Population	4,648,494
Senate—	
1) Number of seats in senate (from 40 districts)	40
2) Average, or "ideal" population per senator	116,212
3) Largest population per senator	122,242
4) Smallest population per senator	110,938
5) Greatest plus and minus deviations from average:	+5.2% —4.5%
6) Average percentage variance	±2.19%
7) Minimum population necessary to elect 21 senators (a majority of senate)	2,389,703 or 51.4%
House of Delegates—	
1) Number of seats in house (from 52 districts)	100
2) Average or "ideal" population per representative	46,485
3) Largest population per representative*	50,964
4) Smallest population per representative*	43,319

5) Greatest plus and minus deviations from average*	+9.6% —6.8%
5a) Greatest plus and minus deviation from average, including floater districts	+9.6%
(Chesapeake floater)	—14.0%
6) Average percentage variance*	±3.89%
7) Minimum population necessary to elect 51 representatives (a majority of house)*	2,321,704 or 49.9%
8) Minimum population necessary to elect fifty-one representatives (a majority of house)**	2,291,543 or 49.29%

*Excludes floater districts and districts containing localities also represented in floater districts.

**Includes floater districts and districts containing localities also represented in floater districts.

March 24, 1971

Explanation of Computations in "Statistical Data of Virginia's 1971 Legislative Redistricting"

Most of the seven items for each legislative house are virtually self explanatory. But the following summary indicates how the figures were derived and their significance.

1.) Number of seats in house (and number of districts electing them). The number of seats in each chamber are those allocated in the redistricting. All 40 Senate seats are elected from single member districts; thus, the 40 Senators are elected from 40 districts. The 100 seats in the House of Delegates are elected from both single and multi-member districts; thus the 100 Delegates are elected from only 52 districts.

2.) Average, or "ideal," population per senator or delegate. The figure indicates how many people ideally ought to be represented by each legislator in each chamber. The figure is obtained by dividing the total State population (4,648,494) by the number of seats in each chamber, and is the figure from which deviations are calculated.

3.) Largest population per senator or delegate. The figure represents the largest population represented by any senator or delegate, exclusive in Virginia of those elected from either floater districts or districts including localities also represented in floater districts. The exclusion is justified because floater districts typically are extraordinarily large in population size because they are used to compensate for underrepresentation of some localities in regular districts by providing them with additional representation in the floater districts.

The population per senator or delegate is the total population of a single-member district or the total population of a multi-member district divided by the number of legislators elected from that district.

4.) See number 3.) above.

5.) Greatest plus and minus deviations from average. The figure represents the largest departures in the actual population size of districts (largest and smallest population per legislator) from the ideal population per legislator. The figure is calculated by subtracting the ideal population per legislator from the actual population per legislator, and dividing the result by the ideal population per legislator.

The figure represents the extremes of over-and under-representation in each legislative chamber, expressed as a percentage; or, put another way, it represents the maximum deviations, plus and minus, from population equality in each chamber.

6.) Average percentage variance. The figure represents the average percentage by which the actual populations represented by each legislator in each chamber vary from the ideal population per legislator. It is calculated by totaling all, plus and minus, of the deviations per legislator in a chamber and dividing the sum by the number of legislators.

The figure represents a measure of how close to population equality is the apportionment of an entire chamber. The smaller the average variance, the greater the overall apportionment of the chamber approximates population equality.

7.) Minimum population necessary to elect a majority of each house (21 in the Senate; 51 in the House of Delegates). This figure represents the least population in the State that theoretically can elect a majority of the members

of each legislative chamber. It is calculated by totaling the average populations per legislator from the smallest to the larger (adjusting for multi-member districts) until a majority of legislators is accounted for. The sum is then divided by the total State population to produce the proportion (percent) of the State's population that can elect a majority of the members of each legislative house.

The figure represents a measure of the overall representativeness of an entire legislative chamber. The closer that the figure approximates the percent that ideally would elect a majority of the chamber if all legislators represented equal populations, the more representative is the chamber. The ideal percentage is calculated by multiplying the average (ideal) population per legislator by the number of legislators that would constitute a bare majority in the chamber.

In Virginia, the ideal percentages are 52.5% for the Senate and 51.0% for the House of Delegates.

DEFENDANTS' (JOAN S. MAHAN) EXHIBIT 7

Exhibit

Prior Legislative History

It is hereby stipulated through the following Exhibit that prior legislative history of the House Reapportionment Act, insofar as pertinent, is as follows:

Preliminary proposal emanating from the House Privileges and Election Committee was to give Norfolk City six (6) delegates, Virginia Beach three (3) delegates, Portsmouth two (2) delegates, with a Floater for all three jurisdictions.

In Northern Virginia, Fairfax County, Fairfax City and Falls Church would receive ten (10) delegates. Prince William and Loudoun Counties would be combined and would receive three (3) delegates, with a Floater representing all jurisdictions.

The Floater in Northern Virginia was subsequently abolished by a floor amendment resulting in the present plan.

Norfolk City received the seven (7) delegates, and a Floater was established among the cities of Virginia Beach, Chesapeake and Portsmouth.

Calculated below are the numerical computations for the Floater Districts in the Tidewater and Northern Virginia areas prior to the amendment by the General Assembly described above. The present percentage deviation is reflected in plaintiff's Exhibits.

Percentage Deviation from Norm (46,485)

The percentage deviation from the Statewide average population per delegate for a district which also is a part of a Floater District can be calculated by first adjusting

for the Floater. This is done by calculating what "share" of the Floater District delegate belongs to each of the regular districts which make it up. This "share" is then added to the number of delegates of the regular district to give the total number of representatives for this district. Dividing this number into the total population of the district gives the population per delegate and the percentage deviation can then be calculated.

District Forty-two (42) [Norfolk], for example, has six delegates plus .52 share of the Floater District:

$$\left(\frac{307{,}951}{591{,}020} = .52\right)$$

The population of District 42 (307,951) divided by 6.52 delegates equals 47,232 population per delegate, which is 1.6 percent above the norm.

District	Delegates	Population	Pop./ Del.	% Deviation
42—				
Norfolk	6.52(1)	307,951	47,232	+ 1.6%
43—				
Virginia Beach	3.29(1)	172,106	52,312	+14.7%
44—				
Portsmouth	2.19(1)	110,963	50,668	+ 9.0%
	12.00			
20—				
Fairfax County		455,021		
Fairfax City		21,970		
Falls Church		10,772		
	10.77(2)	487,763	45,289	— 2.6%

21— Loudoun Prince William		37,150 111,102		
	3.23	148,252	45,898	— 1.3%
	14.00(2)			

(1) Floater District 12, shares for Districts 42, 43, 44
42 (Norfolk) 307,951 / 591,020 = .52
43 (Virginia Beach) 172,106 / 591,020 = .29
44 (Portsmouth) 110,963 / 591,020 = .19

(2) Floater District 22, shares
20—487,763 / 636,015 = .77
21—148,252 / 636,015 = .23

"Share" or Proportion of Delegates

Another way of comparing representation is to examine actual number of delegates, including shares of a Floater, which a district has to the "ideal" number of delegates. The "ideal" number of delegates would equal the district population divided by the average Statewide population per delegate (46,485).

The actual number of delegates, including shares of Floaters was computed for the percent deviations earlier.

District	Population	Actual Share Of Delegates	Ideal Share
42— Norfolk	307,951	6.52 (—.10)	6.62
43— Virginia Beach	172,106	3.29 (—.41)	3.70
44— Portsmouth	110,963	2.19 (—.20)	2.39
20— Fairfax County Fairfax City Falls Church	487,763	10.77 (+.28)	10.49
21— Loudoun Prince William	148,252	3.23 (+.04)	3.19

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ICT

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

DOCKET ENTRIES

No. .....

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March 2—Complaint filed.

March 2—Summons, with 10 copies, issued and delivered to Marshal.

March 3—Certificate of service on Atty. Gen. of Va., filed.

March 11—Petition for temporary restraining order to prevent irreparable damage pending determination of cause, filed.

March 11—Affidavit of Professor T. J. Reed, filed.

March 15—Notification and request for designation of three-judge Court, filed. JAM, Judge.

March 15—Designation of three-judge Court, Honorable Albert V. Bryan, U.S. Circuit Judge, Honorable Robert R. Merhige, Jr., U.S. District Judge, and Honorable John A. MacKenzie, U.S. District Judge, filed. (entered 3-12-71 by CFH, Chf. J.)

March 15—Summons returned executed March 3rd, 1971, as to Joan S. Mahan, Executive Sec., State Board of Elections, A. Linwood Holton, Gov. of Va., Terry H. Davis, Jr., Member, Elec. Brd., City of Norfolk and Donnel P. Davis, Member, Elec. Brd., Virginia Beach, and executed March 4th as to J. Hume Taylor, Jr., Member, Elec. Brd., Norfolk, John B. James, Member, Elec. Brd., Va. Bch., and Catherine Nixon, Member, Elec. Brd., Va. Bch., and executed 3-5-71 as to U. P. Joyner, Jr., Member, State Brd. of Elec., executed 3-10-71 as

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to Edgar A. Prichard, Member, State Brd. of Elec., and executed 3-11-71 as to James Griffiths, Member Elec. Brd., Norfolk, and filed,

March 16—Pre-trial proceedings in Richmond: RRM, Jr., Judge. Plaintiff and counsel appeared. Opening briefs: plaintiff, 5-3-71, defendant, 5-14-71 and plaintiff's reply brief, 5-19-71. Exhibits to be filed with clerk by 4-27-71. Plaintiffs to reply to defendants answer with 7 days after answers filed. Trial date: May 24, 1971. Copies of all pleadings to be sent all counsel and each judge. Plaintiff's discovery cutoff 4-17-71 and defendant's 4-27-71.

March 22—Order on above pretrial conference, setting forth above dates and further that plaintiffs' exhibits shall be marked in sequence commencing with PX-1; and defendants' shall be marked commencing with DX-1, etc., hearing on all motions be deferred until hearing on merits; all parties shall file with Clerk their proposed findings of fact on or before May 20, 1971, etc., entered in Richmond and filed in Richmond March 17, 1971. RRM, Jr., Judge. Copies mailed to counsel and the three judges.

March 22—Defendants' answer to petition for temporary restraining order filed.

March 23—Answer filed by Joan S. Mahan, Edgar A. Prichard, U. P. Joyner, Jr. and A. Linwood Holton, et al., to complaint.

March 23—Trial proceedings: JAM, Judge. Messrs. Henry E. Howell, Jr. and Peter K. Babalas appeared as counsel for plaintiff. Messrs. Andrew P. Miller, Anthony F. Troy and Joseph Campbell appeared as counsel for defendants. Matter came on for hearing on plaintiffs' pe-

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tition for temporary restraining order. Evidence presented and arguments of counsel heard. Counsel granted opportunity to file additional authorities if they desire. Court advised counsel that ruling would be under advisement until after the Virginia General Assembly meets on March 29, 1971.

March 25—Petition for leave to intervene filed by City of Norfolk.

March 25—Affidavit supporting the City of Norfolk's petition filed.

March 25—Notice to counsel filed.

March 29—Order that the City of Norfolk be made a party defendant and be allowed to answer complaint of plaintiffs, entered and filed. JAM, Judge. Notice to all counsel of record.

March 29—Answer of City of Norfolk to complaint filed.

April 2—Notice to take depositions filed by plaintiffs.

April 2—Order that defendants' motion to have this court declare itself without jurisdiction to enter proper order for temporary restraining order is denied; and plaintiffs' motion for restraining order is denied, entered and filed. JAM, Judge. Notice—copies to counsel and judges.

April 7—Order granting plaintiffs leave to file amended complaint, entered 4-5-71 and filed. JAM, Judge. Notice.

April 7—Amended complaint filed.

April 7—Order that prayers contained in amended complaint for a temporary restraining order are denied, entered by judges of three-judge court, and filed. Copies to counsel and judges.

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April 7—Order that this matter is set for argument in Richmond at 2:00 P.M., Monday, May 24, 1971, entered and filed. JAM, Judge. Copies to all counsel and judges.

April 8—Stipulation filed by parties.

April 9—Petition for leave to intervene filed by City of Virginia Beach.

April 9—Affidavit supporting petition for leave to intervene filed.

April 9—Notice of hearing for above petition filed. (April 16, 1971)

April 12—Transcript of proceedings on March 23, 1971 filed. (Copies made and mailed to the Judges.)

April 16—Order that the City of Virginia Beach is made a party defendant and is to file such pleadings as it deems necessary, but such intervention shall not serve to enlarge or extend discovery cut-off dates or hearing date, entered and filed. JAM, Judge. Copies to counsel and Judges.

April 16—Answer filed by City of Virginia Beach.

April 21—Bound volume containing exhibits received from plaintiffs.

April 23—Exhibit No. 1 received from City of Norfolk.

April 23—Stipulation filed by the City of Norfolk.

May 3—Brief on behalf of plaintiffs received.

May 3—Depositions of witnesses received from plaintiffs. (witnesses: Senator H. B. Andrews, L. B. Wood and Professor T. J. Reed)

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May 14—Memorandum filed by the Court in Richmond May 13, 1971. RRM, Jr.

May 14—Order that each of the parties file within seven days of May 13, 1971, such memoranda as they deem appropriate concerning the matters referred to in Court's memorandum; United States requested to file such memorandum as Amicus curiae, entered and filed May 13, 1971 in Richmond. RRM, Jr., Judge. Copies of memorandum and order mailed to all counsel and Attorney General for United States by Clerk in Richmond.

May 14—Brief received from City of Norfolk. (counsel mailed copies to Court)

May 17—Brief on behalf of intervenor, City of Virginia Beach, received. (counsel mailed copies to Court)

May 18—Brief on behalf of the Commonwealth of Virginia received. (Counsel mailed copies to Court)

May 19—Plaintiffs' brief in reply to defendants' brief received.

May 19—Plaintiffs' supplementary memorandum requested by the Court regarding 1965 Voting Rights Act received.

May 20—Findings of Fact and Conclusions of Law received from Intervenor, City of Norfolk.

May 20—Memorandum of the Intervenor, City of Norfolk, received.

May 20—Plaintiffs' proposed findings of fact and conclusions of law received.

May 24—Defendants' proposed findings of fact and conclusions of law received in Richmond.

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May 24—Trial proceedings in Richmond—Judges Bryan, MacKenzie and Merhige. Heard with C/A 111-71-A and C/A 174-71-R. Counsel appeared. Oral orgument. Order entered by panel as follows: (a) Trial is continued. (b) Primary election of Virginia set for June 8 is posponed until Sept. 14, 1971 (c) Unless Virginia Adopts reapportionment on or before June 15, 1971, Court shall proceed with trial and thereafter formulate a plan of reapportionment within the prescription of the Voting Rights Act and resolving the valid objections, if any, of the plaintiffs to the 1971 reapportionment legislation, and (d) jurisdiction of suit be retained by the Court until further order. Court adjourned.

May 24—Order entered on above rulings, and filed in Richmond.

June 1—Motion filed by the Attorney General of Virginia that Court amend its order of May 24, 1971 to allow General Assembly of Virginia to adopt and submit reapportionment legislation either to the Attorney General of the U.S. or to District Court of the District of Columbia for declaratory judgment, on or before June 24, 1971.

June 10—Order entered in Richmond that Attorney General's motion that Court's order of May 24, 1971 be amended is denied, entered and filed June 2, 1971. RRM, Jr., Judge.

June 2—Pltf-Inv. opposition to defts.' motion to amend filed.

June 3—Plaintiffs' answer to motion filed by Attorney General of Virginia, filed

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June 10—Plaintiffs' motion for modification of order of May 24, 1971, and to fix date for trial, filed.

June 14—Order that a hearing on the remaining issues is set commencing at 10:30 A.M. on June 16, 1971, at the direction of the panel, entered and filed June 11, 1971 in Richmond. RRM, Jr., Judge.

June 16—Trial proceedings: AVB, RRM, Jr. and JAM, Judges—Parties appeared by counsel. Case argued.

June 16—Mot. of Mahan et al. to amend pre-trial order filed.

July 2—Opinion filed. ob

July 2—Interlocutory order that Acts of General Assembly of Virginia generally known as the reapportionment statutes of 1971, etc. is hereby declared invalid on ground that they include provisions violating Equal Protection Clause of the Constitution; that members of Senate and House of Delegates be elected from the electoral districts described in opinion, etc.; that such of defendants as are charged by law with conduct of said elections is enjoined and restrained from conducting any of said elections except those established and specified in opinion; That the Governor and the Attorney General of Virginia are dropped as parties to these actions (consolidated with C/A 111-71-A and 174-71-R); that plaintiffs recover costs allowed by law, and that jurisdiction of suit is retained for enforcement of this order, the determination of any related matter, and for any other appropriate purpose, entered at 1 P.M. July 2, 1971 in Alexander, Richmond and Norfolk, Virginia, and certified copy filed in Norfolk. AVB, ORL, JAM and RRM, Jr. Copies to all counsel by Court. ob

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July 13—Notice of appeal filed behalf of defendants, Joan S. Mahan, U. P. Joyner, Jr. and Edgar A. Prichard, Members, Virginia State Board of Elections filed.

July 13—Motion for stay of judgment pending appeal filed behalf of the defendants.

July 13—Petition of City of Virginia Beach for an order relieving it from ruling of Court.

July 13—Petition of City of Virginia Beach for stay of proceedings, filed.

July 13—Trial Proceedings: JAMacK, judge. Appearances; Henry E. Howell for plaintiffs, Andrew P. Miller, Atty. Gen., Anthony Troy, Ass't. Atty. Gen. and Vann Lefcoe, Ass't. Atty. Gen. on behalf of defendants, Gordon D. Tayloe, Ass't. City Atty. behalf of City of Norfolk; and J. Dale Bimson, City Atty. on behalf of City of Virginia Beach, Virginia. Matter came on for hearing on defendants' motion to stay order of July 2, 1971, pending appeal to U.S. Supreme Court and motion of Virginia Beach for stay and rehearing. Arguments heard. Order Denying motion for a stay pending appeal and the petition for rehearing by Virginia Beach entered and filed in open Court. (docketed July 14, 1971 and copy placed on o.b.) (Copies handed Messrs. Howell, Bimson, Tayloe & Atty. Gen.)

July 14—C. copies of above order mailed Messrs. Babalas, Campbell, Evans and Hunton, Wms., Gay, Powell & Gibson.

July 15—Notice of appeal to Supreme Court filed for City of Virginia Beach.

Dec. 10—Designation of record on appeal by defendants Joan S. Mahan, etc., et al., filed.

COMPLAINT

Howell, et al. v. Mahan, et al.

Voters' Complaint To Correct Unconstitutional Redistricting Of The Senate Of The General Assembly Of The Commonwealth Of Virginia

I.

This Court has original jurisdiction of this action pursuant to 28 United States Code, Section 1343(3) and the plaintiffs have a right to bring this suit pursuant to the Civil Rights Act of the United States, 42 United States Code, Sections 1983, 1988.

II.

Under the provisions of 28 United States Code, Sections 2281 and 2284, special provision is made for hearing causes of action involving an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute or an order made by an administrative board or commission acting under state statute, whenever said application is based on the unconstitutionality of such statute.

III.

The plaintiff, Henry E. Howell, Jr., is a citizen, voter and taxpayer of the City of Norfolk, the Commonwealth of Virginia and the United States of America, and resides at 1117 Cambridge Crescent, in the City of Norfolk, Virginia, in what has been designated under the Redistricting Act which is the subject of this complaint, as the Fifth Senatorial District. He is presently a duly elected Senator to the General Assembly of Virginia from the City of Norfolk, Virginia, and intends to be a candidate for re-election to said office, subject to elections to be held this year.

IV.

The plaintiff, Peter K. Babalas, is a citizen, voter and taxpayer of the City of Norfolk, the Commonwealth of Virginia and the United States of America, and resides at 164 West Belvedere Road, in the City of Norfolk, Virginia, in what has been designated under the Redistricting Act which is the subject of this complaint, as the Sixth Senatorial District. He is presently a duly elected Senator to the General Assembly of Virginia from the City of Norfolk, Virginia, and intends to be a candidate for re-election to said office, subject to elections to be held this year.

V.

The plaintiff, Angeline V. Fitzpatrick, is a citizen, voter and taxpayer of the City of Norfolk, Virginia, the Commonwealth of Virginia, and the United States of America, and resides at 136 Cherry Street, in the City of Norfolk, the said address being located on the northerly side of said Cherry Street, in what has been designated under the Redistricting Act which is the subject of this complaint as the Sixth Senatorial District.

VI.

The plaintiff, Reverend Lawrence L. Craig, is a citizen, voter and taxpayer of the City of Norfolk, Virginia, the Commonwealth of Virginia, and the United States of America and resides at 525 West 27th Street, in the City of Norfolk, the said address being located in what has been designated under the Redistricting Act which is the subject of this complaint as the Fifth Senatorial District. Plaintiff is the duly elected Democratic Committeeman for Precinct Fourteen in said City of Norfolk.

VII.

The plaintiff, William K. Beach, is a citizen, voter and taxpayer of the City of Norfolk, the Commonwealth of Virginia, and the United States of America, and resides at 2037 Kingston Avenue, in the City of Norfolk, in what has been designated under the Redistricting Act which is the subject of this complaint as the Seventh Senatorial District.

VIII.

Each of the plaintiffs herein is entitled to vote for members of the General Assembly of the Commonwealth of Virginia and they bring this action in their own behalf and on behalf of all other voters similarly situated in the Commonwealth of Virginia.

IX.

Defendants and each of them are citizens of the United States and of the Commonwealth of Virginia and are sued in their representative capacities as hereinafter set forth:

a. The defendants, Joan S. Mahan, Edgar A. Prichard and U. P. Joyner, Jr., are members of the State Board of Elections of the Commonwealth of Virginia, the defendant, Joan S. Mahan, being the Secretary thereof, and as such, said defendants are charged with supervising and coordinating the work of the City and County electoral boards, making rules and regulations for the conduct of elections, preparing forms and records for the registration of voters and performing other duties in respect of primary and general elections.

b. The defendant, A. Linwood Holton, is Governor and Chief Executive Officer of the Commonwealth of Virginia and on March 2, 1971, signed into law the legislative en-

actment that created the unconstitutional redistricting involving the Fifth, Sixth and Seventh Senatorial Districts, and as Chief Executive Officer of the Commonwealth of Virginia is the officer who would be required to call any Special Session of the Virginia General Assembly that may be directed by this Court, and under 28 United States Code, Section 2284, must be notified of any action in a United States Court involving the enforcement of a state statute, and for these reasons should be a party to this suit.

c. The defendants, Terry H. Davis, Jr., James Griffiths and J. Hume Taylor, Jr., are members of the Electoral Board of the City of Norfolk, Virginia, and as such said defendants are charged with the duty of the preparation of the ballots and voting machines and the conduct of elections within the City of Norfolk, Virginia, establishing voting precincts, canvassing the result of elections and performing other duties in connection with the election process in primary and general elections.

d. The defendants, John B. James, Donnell P. Davis and Catherine Nixon, are members of the Electoral Board of the City of Virginia Beach, Virginia, and as such said defendants are charged with the duty of the preparation of the ballots and voting machines and the conduct of elections within the City of Virginia Beach, Virginia, establishing voting precincts, canvassing the result of elections and performing other duties in connection with the election process in primary and general elections.

X.

Plaintiffs now are denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States and plaintiffs bring this

cause of action on their own behalf and on behalf of the voters in the City of Norfolk, Virginia, and in Virginia, who are similarly situated. Plaintiffs seek a declaration of the validity or invalidity of the acts or statutes of the Commonwealth of Virginia which apportion and district members of the Senate of Virginia, and in particular as the said Act applies to the citizens and voters of the City of Norfolk, Virginia. They further seek such injunctive relief as may be proper to assure them and all other voters similarly situated the free and equal franchise, the free and equal right to campaign as candidates, and the free and equal right for candidates to campaign and the equal protection of the laws to which they are entitled under the Fourteenth Amendment to the Constitution of the United States, and which rights are now being denied them by the defendants who have and/or will comply with certain unconstitutional statutes and private acts as more particularly set forth.

XI.

Sections 40 to 43, inclusive of the Constitution of Virginia, applicable at the time of the filing of this suit, provide that the legislative power of the Commonwealth shall vested in the General Assembly, which shall consist of the Senate and House of Delegates and that the Senate shall consist of not more than forty (40) members and not less than thirty-three (33) members, who shall be elected quadrennially by the voters of the several Senatorial districts: that the House of Delegates shall consist of not more than one hundred (100) members and not less than ninety (90) members, who shall be elected biennially by the voters in the several House districts and that a reapportionment of the Commonwealth and the Senatorial and House districts shall be made in the year 1932 and every ten (10) years

thereafter. Article 2, Section 6, of the Constitution of Virginia, as amended, provides, in so far as it is applicable to the allegations of this complaint, that the General Assembly shall reapportion the Commonwealth into electoral districts in accordance with the section in the year 1971 and every ten (10) years thereafter. On Friday, February 26, 1971, the General Assembly of Virginia gave final approval to a bill entitled "Committee Amendment In The Nature Of A Substitute For Senate Bill No. 54—A bill to amend the Code of Virginia by adding a section numbered 24.1-14.1 and to repeal § 24.1-14 of the Code of Virginia, the amended and repealed sections relating to State Senatorial Districts." A copy of said Bill is attached to this complaint marked as Exhibit "A" and incorporated herein by reference. The citizens and voters of the City of Norfolk, Virginia, are allocated to Senatorial Districts Fifth, Sixth and Seventh.

XII.

The census enumeration for 1970 allocates 4,648,494 persons to the State of Virginia, 307,951 persons to the City of Norfolk and 172,106 persons to the City of Virginia Beach. The average number of persons per Senator is 116,212. Norfolk is entitled to 2.64 Senators.

XIII.

During the latter portion of the Special Session of the General Assembly, which was convened on January 6, 1971, the Senate Privileges and Elections Committee announced, without stating any reasons whatsoever therefor, that it had decided to divide Norfolk into single members districts and, thereafter, a Sub-committee of the Privileges and Elections Committee, the chairman of which Sub-committee

was Senator Hunter B. Andrews, directed that the City of Norfolk, Virginia, be divided into districts running in a north-south direction and, for the first time in the history of legislative redistricting, census enumeration tracts would be used in determining the population within said districts. Said decision was arbitrary and without rational basis. The City of Norfolk, Virginia, which is the home of the largest naval installation in the world, the Bureau of Census of the United States Department of Commerce, as a matter of convenience in enumerating and allocating men attached to naval vessels and who live in the Greater Norfolk Area, counted said crew members with respect to their persons aboard vessels home ported at Norfolk, Virginia. At the time the 1970 census was taken the Bureau of Census assigned tract No. 000999 to the naval personnel stationed aboard naval vessels home ported at Norfolk, Virginia, and the count was 36,693 naval personnel. In addition, the Bureau of Census enumerated on census tract 0009, 13,427 persons living in military housing on government property, all within the Fifth Senatorial District. The Census tracts and population count allocated to the tracts for Norfolk compiled by the Bureau of Census, United States Department of Commerce, is marked as Exhibit "B" attached to this complaint and incorporated herein by reference. The Census tracts and population count allocated to the tracts for Virginia Beach compiled by the Bureau of Census, United States Department of Commerce, is marked as Exhibit "C" and attached to this complaint and incorporated herein by reference. Attached to the original of this complaint are maps showing the outlines of Senatorial Districts Fifth and Sixth, as well as the 75,000 people of the City of Norfolk that are joined by approximately 40,000 people residing in that portion of the City of Virginia Beach immediately

adjacent to the City of Norfolk, which will comprise the Seventh Senatorial District. Said maps are marked as Exhibit "D" for the purpose of identification and made a part of this complaint by reference.

XIV.

Whereas 36,693 persons allocated to Senatorial District Fifth were enumerated with respect to where they work, namely, aboard naval vessels home ported at Norfolk, all other persons in the Fifth District, the Sixth District and that part of the City of Norfolk that is included in the Seventh District, were enumerated with respect to where they live. Approximately one-half or 18,346 of the men enumerated aboard vessels home ported at Norfolk live ashore and only a small percentage of these thousands of persons live within the limits of the Fifth District. See the affidavit of Bernard L. Michel and the letter of Rear Admiral J. O. Cobb, Commandant, Fifth Naval District, referred to in said affidavit, all of which is marked as Exhibit "E" attached hereto and by reference made a part hereof. It is conservatively estimated and alleged that more than 10,000 of the 36,693 men that have been allocated to the population of the Fifth Senatorial District do not live in the Fifth Senatorial District and cannot vote for a candidate in that district. By reason of this fact, the Fifth Senatorial District is substantially underpopulated and the Sixth and Seventh Senatorial Districts are overpopulated without rational basis and in such a manner as to effect invidious discrimination with respect to the plaintiffs and others similarly situated.

XV.

By reason of Naval Instruction 5726.4A issued 3 June 1970, a copy of which is attached to this complaint marked

as Exhibit "F" and by reference made a part hereof, a candidate in the Fifth Senatorial District is prohibited from engaging in normal campaign communications, meetings and other types of political activity traditional to an election for public office in the United States of America, the State of Virginia and the City of Norfolk, Virginia. The provisions of 18 United States Code, Section 1382, which is incorporated and referred to in Naval Instruction 5726.4A would make a candidate guilty of a misdemeanor if he were to campaign on said governmental property where 50,120 persons, or approximately Forty-Three (43%) Per Cent of the total persons allocated to the Fifth Senatorial District either work or reside. In the Sixth Senatorial District no such handicap is imposed upon the candidate. The isolation of 50,120 persons out of the total of approximately 116,212 illegally and unjustly discriminates against a candidate running in the Fifth Senatorial District and deprives him of the normal exposure to registered voters and domiciliary residents that make up the other Senatorial districts.

XVI.

Whereas in the City of Norfolk, citizens living on one side of a street were placed in one District and citizens living on the opposite side of the street were placed in another Senatorial District in order to achieve precise adherence to the Senatorial norm of 116,212, substantial deviations from the norm *were permitted in other Senatorial Districts in order to preserve the historical geographical boundaries or to minimize the division of the same.* In support of said allegation is attached hereto marked Exhibit "G" and by reference made a part of this complaint the approximate population of the Senatorial Districts pre-

pared by the Division of Statutory Research and Drafting of the Commonwealth of Virginia.

XVII.

The impact of the military population heretofore referred to, has throughout the history of Norfolk been diffused by having the candidates for the Senate of Virginia run At Large, and such a plan is the only constitutional method for the apportionment of Senators in the City of Norfolk.

XVIII.

The effect of the current Redistricting Plan is to unconstitutionally dilute the minority vote in the City of Norfolk, Virginia.

XIX.

The plaintiff, Peter K. Babalas, is currently a member of the Senate of Virginia from the City of Norfolk, having been elected in an At Large election in Norfolk and by reason of the irregular distribution of naval personnel enumerated by the Census Bureau for convenience purposes aboard their vessels home ported at Norfolk, but who actually live in part in the Sixth District, the District in which he resides is overpopulated and the votes of the citizens in his district are devaluated to such an extent as to unjustly and invidiously discriminate against him and other citizens similarly situated.

XX.

The plaintiff, Angeline V. Fitzpatrick, avers that she has had the right to vote for Senators to the Virginia General Assembly from the City of Norfolk on an At Large basis; that in the elections in the years 1965 and 1967 she

had the right to use her vote to elect Three (3) Senators and one of the Senators for whom she voted in those years was the plaintiff, Henry E. Howell, Jr., who on those occasions resided at 1117 Cambridge Crescent, in the City of Norfolk, Virginia; that as a result of the arbitrary and irrational districting of the City of Norfolk the fact that she lives on the northerly side of Cherry Street will prevent and deprive her of the right to vote for Senator Henry E. Howell, Jr., so long as he continues to reside at the above address, although this plaintiff would like to continue to cast her vote for said individual. Said plaintiff further alleges that there is an unconstitutional deviation in population requiring more citizens to elect a Senator in her district, the Sixth Senatorial District, than in the Fifth Senatorial District.

XXI.

The plaintiff, Reverend Lawrence L. Craig, is a member of the Negro race, which race constitutes a minority of the population of the City of Norfolk, Virginia. Plaintiff avers that in At Large elections the aggregate number of votes possessed by his minority race are such that all candidates At Large seek to campaign with and to represent his minority, which is decisive in a contested At Large election, and that the effect of single-member districts has been to unconstitutionally dilute the weight and effectiveness of his vote and the vote of members of his minority race similarly situated. The plaintiff avers that the lines of the Fifth Senatorial District have been unconstitutionally drawn so as to prefer by race and color.

XXII.

The plaintiff, William K. Beach, avers that he has had the right to vote for State Senators from the City of Nor-

folk, on an At Large basis; that in the elections in the years 1965 and 1967 he had the right to use his vote to elect Three (3) Senators and one of the Senators for whom he voted in those years was the plaintiff, Henry E. Howell, Jr., who on those occasions resided at 1117 Cambridge Crescent in the City of Norfolk, Virginia; that as a result of the arbitrary and irrational districting of the City of Norfolk, the fact that he lives at 2037 Kingston Avenue in the City of Norfolk, will prevent and deprive him of the right to vote for Senator Henry E. Howell, Jr., so long as he continues to reside at the above address, although the plaintiff would like to continue to cast his vote for said individual. The said plaintiff further alleges that there is an unconstitutional deviation in population requiring more citizens to elect a Senator in his district, the Seventh Senatorial District, than in the Fifth Senatorial District.

XXIII.

Each plaintiff on behalf of himself and all voters similarly situated avers that the dividing into single member districts of a city such as the City of Norfolk, Virginia, diffuses and weakens the unity of representation that central city citizens need and are entitled to and that the disunity unconstitutionally dilutes the value of the vote of a central city as compared to the unity that will accrue to the less populated areas of Virginia, whose total population results in the allocation of a single Senator elected on at At Large basis.

XXIV.

The Reapportionment or Redistricting Act complained of has effected invidious discrimination in violation of the rights of the plaintiffs and other voters similarly situated under the Constitution of the United States.

XXV.

Plaintiffs aver that the constitutional requirements aforementioned can only be met by redistricting the cities of Norfolk and Virginia Beach so that two Senators run At Large and are voted upon by the qualified voters of the City of Norfolk, Virginia, and one Senator run At Large from the City of Virginia Beach, Virginia, to be voted upon by the qualified voters of the City of Virginia Beach, Virginia, or, in the alternative to be voted upon by the qualified voters of the City of Virginia Beach, Virginia, that does not include the Boroughs of Blackwater, Pungo and Princess Anne and which does not include the Oceana Naval Station as is referred to in the description of the Eighth Senatorial District, and a fourth Senator to be voted on by the combined votes of citizens of the City of Norfolk and Virginia Beach in direct proportion to their excess populations. Such a plan would diffuse and give representation in a constitutional manner to the military population which is distributed in an irregular manner throughout the Norfolk area and to the excess population in the two cities here involved.

XXVI.

The General Assembly of Virginia has been recessed until March 29, 1971, and in the meanwhile Primary elections are now scheduled to be held on June 8, 1971, and regular elections to be held November 2, 1971, and unless the inequities herein complained of are corrected by this court the plaintiffs and all other voters and candidates similarly situated will be denied the equal protection of the laws in said elections. The defendants, unless prevented by this Court, will perform their duties in the conduct of said elections in an unconstitutional manner.

XXVII.

The constitution and laws of the State of Virginia do not require the Virginia General Assembly to reapportion representation and to redistrict the City of Norfolk but once every ten (10) years. If this Honorable Court does not grant the relief herein sought and thereby afford relief to said plaintiffs and others similarly situated whereby they may obtain fair and equal representation in the Senate of the Virginia General Assembly, the said plaintiffs and others similarly situated will suffer irreparable damage and harm for the next ten (10) years, if not longer.

Wherefore, plaintiffs pray:

1. That process according to law may issue to the named defendants to this action.

2. This Court may take jurisdiction of the controversy.

3. That a special Three Judge Court be called and impaneled to hear and determine this action and declare the rights of the plaintiffs in the premises to be as follows:

a. That the present redistricting of the City of Norfolk and apportionment of Senators denies the plaintiffs and other voters similarly situated equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

b. That Senate Bill 54 in so far as it creates Senatorial Districts Fifth, Sixth and Seventh is unconstitutional and void.

c. That a prompt hearing be granted by one or more of the Three Judges to be designated, to the end that temporary relief can be granted so that the General Assembly will not be adjourned, but merely recessed pending the determina-

tion of this cause *or if, due to the fact that redistricting is sought only with respect to Norfolk and a portion of Virginia Beach,* this Court can by decree grant the necessary relief, that such relief be granted prior to the date of the June primaries.

4. That upon the final hearing of this action the Court grant to the plaintiffs the following relief:

a. Defendants and each of them be permanently restrained and enjoined from furnishing forms for nominations, from receiving nominations or petitions thereof, from conducting and certifying elections and from taking any and all other steps with respect to the election of members of the Senate of the Commonwealth of Virginia under and pursuant to the provisions of Senate Bill 54.

b. That defendants be directed to declare and hold the next primary and general elections for members of the Senate from the districts involved on an At Large basis as more particularly set out above.

c. That plaintiffs have such other, further and alternative relief as the nature of the cause may require and to this Court may seem proper.

PETITION FOR TEMPORARY RESTRAINING ORDER

Petition for Temporary Restraining Order to Prevent Irreparable Damage Pending Determination of Cause Pursuant to 28 United States Code Annotated, Section 2284(3).

To the Honorable John A. MacKenzie,
Judge of the Court aforesaid:

Now comes Henry E. Howell, Jr., on behalf of himself and the other plaintiffs herein and citizens similarly situated

and petitions this Honorable Court for a temporary restraining order restraining the defendants herein from holding a statewide primary or any other election for the purpose of electing the members of the Senate of Virginia, and further that all election requirements, processes and procedures be stayed pending the ruling by the Three (3) Judge Court which has been requested in the complaint filed herein, the said temporary restraining order being requested for the reason that petitioner and others similarly situated will suffer irreparable damage unless such relief be granted.

In support hereof petitioner respectfully shows as follows:

(1) The complaint filed herein and the affidavits attached thereto and the affidavits annexed to this petition establish a prima facie case of unconstitutionality and invidious discrimination with respect to the apportionment and redistricting of Senatorial representation in the City of Norfolk, Virginia.

(2) In particular, and without limitation, the affidavit of Professor T. J. Reed, establishes that approximately Fifty-Nine (59%) Per Cent of the citizens enumerated for the convenience of the United States Census Bureau as being stationed aboard vessels home ported at Norfolk were presumed by the said Census Bureau as living aboard said vessels, when, in fact, this Fifty-Nine (59%) Per Cent of citizens allocated to the Fifth Senatorial District reside outside the Fifth Senatorial District.

(3) At the present time primary elections will be held pursuant to the unconstitutional districting and apportionment of State Senators, which elections would be unconstitutionally held and be subject to being set aside upon final determination of this cause.

(4) That the estimated expense of holding primary elections in the City of Norfolk, Virginia, is $15,000.00; that if the primary elections for State Senate proceed as scheduled, candidates for that office will be required to incur expenditures incident to said elections amounting to thousands upon thousands of dollars and if the elections were set aside, these sums of money would be forever lost and the monies of the taxpayers expended for elections that might hereafter be held unconstitutional and null and void would be wasted and irrecoverable.

(5) That plaintiffs have acted promptly, having filed a complaint seeking a declaration of the unconstitutionality with respect to the aforesaid senatorial redistricting and apportionment act on Tuesday, March 2, 1971, within twenty-four hours of the signing of said bill by the Honorable A. Linwood Holton, Governor of Virginia.

(6) That the granting of said relief will not interfere with the orderly processes of government, for this Court will be able to hear and determine this cause in time for primary elections to be held and the nominees to be determined at a seasonable date prior to November 2, 1971.

(7) That if a temporary restraining order is not granted as herein prayed for the defendants will proceed to hold primary elections on June 8, 1971, and the aforementioned irreparable damage will have been incurred by petitioner and others similarly situated. It is, therefore, essential, appropriate, just and proper and in accordance with the intent and purpose of 28 United States Code Annotated, Section 2284(3) that, pending the final disposition of the matters involved herein, defendants be restrained from holding the aforesaid elections and that all elections requirements, processes and procedures be stayed.

Wherefore, petitioner prays:

(1) That this Court issue an order directing the defendants, acting by and through their counsel, to appear before this Court at a time and place fixed by this Court and show cause, if any there be, why a temporary restraining order should not issue restraining the defendants in the manner and to the extent prayed for herein pending the final decision of this matter.

(2) That upon return of said order to show cause, the Court issue an order restraining the defendants in the manner set forth above.

(3) That the Court grant such other and further relief as may be just and proper.

Dated at Norfolk, Virginia, this the 10th day of March, 1971.

App. 113

Navcomptnote 5740
12 Feb 1970

U.S. Department of Commerce
Bureau of the Census
Washington, D.C. 20233
Office of the Director

Reply to Attn. of:
S&PB FD

Subject:

Instructions for Enumeration of Personnel Assigned to U.S. Military and Coast Guard Vessels in the 1970 Census of Population

To:

All Ship Commanders

The Bureau of the Census, with the agreement of the Departments of Defense and Transportation, requests your cooperation in conducting the 1970 Census of Population by obtaining an enumeration of all personnel assigned to your vessel on 1 April 1970, including civilians. Failure of an individual to furnish the information called for on the questionnaire subjects him to the penalties provided under Title 13, United States Code, Section 221. Complete confidentiality of the information on the census questionnaire is also provided under Title 13, United States Code, Section 9.

The "1970 Report for Military and Maritime Personnel," Form D-21, which will be the questionnaire used in this enumeration, will be mailed directly to you from the Bureau of the Census. If you need additional supplies, complete the preaddressed Form D-324, "Request for Additional Materials," which will be included with the shipment

of questionnaires. Complete the enumeration as outlined below.

1. Distribute a D-21 to all persons assigned to the ship on 1 April 1970 including civilian personnel. Include all married personnel in the enumeration even though they may be home with their families on 1 April. Wives of personnel assigned to vessels will be instructed not to include their husbands when they complete their census forms.

2. All personnel who expect to be away from the ship during the Census period should complete their questionnaire prior to leaving. A D-21 must be completed from records for personnel who are away from the ship during the census and have not completed the D-21.

3. Complete Form D-323, "Enumeration Control Form," and return it to the Bureau of the Census, Jeffersonville, Indiana 47130 with the completed D-21's no later than 15 April 1970.

Your assistance in obtaining a complete and accurate census of the United States will be greatly appreciated.

/s/ George H. Brown
Director
Bureau of the Census

AMENDED COMPLAINT

Plaintiffs, for their amended complaint herein, state as follows:

I.

Plaintiffs hereby adopt their original complaint filed herein in its entirety, with the same force and effect as though repeated herein.

II.

Plaintiffs further allege that the dividing of the cities of Norfolk, Virginia, and Virginia Beach, Virginia, into single-member Senatorial Districts constitutes a change in a voting standard, practice and procedure for the plaintiffs herein and all other citizens similarly situated.

III.

The Commonwealth of Virginia has failed to comply with the provisions of 42 U.S. Code § 1973, and in particular, § 1973c, as amended, in that the Commonwealth has failed to bring a declaratory judgment suit in the District Court for the District of Columbia, and has failed to obtain approval of the office of the Attorney General of the United States of America, all of which is requisite before limiting the right of citizens in the cities of Norfolk, Virginia, and Virginia Beach, Virginia, to elect Senators At Large, since single-member Districts constitute a change not in force and effect on November 1, 1964.

Wherefore, in addition to the relief prayed for in their Complaint filed herein, plaintiffs formally apply for a temporary restraining order and, thereafter, a temporary injunction restraining candidate qualifications for single-member Senatorial Districts in the cities of Norfolk, Virginia Beach, Richmond, and any other political subdivision which did not have single-member Senatorial District elections prior to the passage of the reapportionment or redistricting act of 1971, and the plaintiffs further pray that they may have such other and further relief as in equity may be deemed just and right.

SECOND AMENDED COMPLAINT

Plaintiffs, for their second amended complaint herein, state as follows:

I.

The plaintiffs, by this second amended complaint, supplement the allegations contained in the original and amended complaint filed herein.

II.

Prior to the opinion of the Supreme Court of the United States in *Edgar D. Whitcomb, Governor of the State of Indiana* v. *Patrick Chavis, et al.*, handed down on June 7, 1971, the Department of Justice of the United States of America noted an exception to the deficiency of Senatorial Districts Fifth and Sixth on the grounds that the lines divided concentrations of Negro voters, appeared contorted and did not conform to natural boundaries. Pursuant to this exception, the Privileges and Elections Committee of the Senate of Virginia met and redrew the line separating proposed Senatorial Districts Fifth and Sixth so as to include more Negro citizens in Senatorial District Sixth, reducing the population in Senatorial District Fifth, but still failing to follow natural boundaries and creating irregular lines.

III.

On June 11, 1971, the General Assembly of Virginia passed Senate Bill 125, changing the lines as aforesaid and the territorial changes effected by said Act reduced the population in the Fifth District to 115,711 and increased the population of the Sixth District to 116,466.

IV.

The changing of the lines so as to include more Negro citizens in Senatorial District Sixth changed the residence of the plaintiff, Senator Peter K. Babalas, from Senatorial District Sixth to Senatorial District Fifth, making a nullity his previous filing and qualification as a candidate for the Democratic nomination from the Sixth District.

V.

The lines between Senatorial Districts Fifth and Sixth have been drawn to prefer by race and color contrary to the guarantees of the Fourteenth Amendment to the Constitution of the United States.

VI.

The effect of the changes in the irregular lines which divide Senatorial Districts Fifth and Sixth and, in particular, where the new line zigs to the west down the Norfolk and Western Railroad tracks off of Church Street, to where it proceeds in a southerly direction down Colonial Avenue to Olney and zags in an easterly direction to Duke Street, was to further unconstitutionally dilute the vote of the plaintiff, Reverend Lawrence L. Craig, a member of the Negro race residing on 27th Street in the Fifth Senatorial District, and other voters similarly situated.

VII.

The actions of the General Assembly of Virginia in approving the lines dividing Senatorial Districts Fifth and Sixth so as to prefer by race and color in the Sixth Senatorial District has unconstitutionally diluted the vote of a

recognizable minority in the Fifth and Seventh Senatorial Districts, where Negro citizens reside, whereas in At Large elections the collective influence of this racial minority may exert its maximum influence on the election of all Senators within the multi-member District.

VIII.

The contorted and manipulated lines dividing Senatorial Districts Fifth, Sixth and Seventh constitute unconstitutional gerrymandering.

Wherefore, plaintiffs pray for the relief sought and set out in their complaint and amended complaint herein, and in addition thereof pray that this Honorable Court provide the seasonable times for candidates to qualify for any Senatorial District apportioned or redistricted by decree of this Court or action taken by the General Assembly pursuant to a decree of this Court.

ANSWER

Now come the Attorney General of Virginia, Andrew P. Miller, as counsel for defendants Joan S. Mahan, Executive Secretary, State Board of Elections, Edgar A. Prichard, Member, State Board of Elections, U. P. Joyner, Jr., Member, State Board of Elections, A. Linwood Holton, Governor of Virginia; Joseph H. Campbell, Commonwealth's Attorney of Norfolk, counsel for members of the Electoral Board of the City of Norfolk; and Andre Evans, Commonwealth's Attorney for the City of Virginia Beach, as counsel for the members of the Electoral Board of the City of Virginia Beach, and in response to the Complaint filed herein, answer and say:

First Defense

The Governor of Virginia does not threaten the plaintiffs or any other person for the operation, enforcement or or execution of any law, nor has the Court jurisdiction to require the Chief Executive Officer of the Commonwealth to call any special session of the Virginia General Assembly. He is therefore neither a necessary nor proper party to this suit and should be dismissed.

Second Defense

Plaintiffs lack standing to maintain the instant suit.

Third Defense

The Complaint fails to state a claim upon which relief can be granted, nor do they state a cause of action on behalf of any of the plaintiffs.

Fourth Defense

In response to allegations in the Complaint, defendants:

(a) Deny the allegations of Paragraph 1.

(b) Admit the allegations of Paragraph 2.

(c) Admit the allegations of Paragraphs 3, 4, 5, 6, 7 and 8 but deny that plaintiffs have standing to maintain this instant suit.

(d) Admit the allegations of Paragraphs 9 (a) and 9 (b) [but deny as to Paragraph 9 (b) that the Governor is a necessary party]; admit the allegations of Paragraphs 9 (c) and 9 (b).

(e) Deny the allegations of Paragraph 10.

(f) As to the allegations of Paragraph 11, defendants aver that they are conclusions of law and need not be answered.

(g) Admit the allegations of Paragraph 12, except that Norfolk is entitled to 2.65 Senators.

(h) Admit, as to the allegations in Paragraph 13, that the City of Norfolk was divided into single member Senatorial Districts but deny that such allocation of representation was arbitrary and aver that it was properly based upon information from the United States Census Bureau.

(i) Deny the allegations of Paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24.

(j) As to the allegations of Paragraphs 25, 26 and 27, defendants aver that the Senate reapportionment as passed by the 1971 General Assembly is constitutionally valid and that all constitutional rights of plaintiffs have been met by the present redistricting.

STIPULATION

It is stipulated by and between Andrew P. Miller, Attorney General of Virginia, on behalf of the defendant members of the State Board of Elections, Joseph Campbell, Commonwealth's Attorney for the City of Norfolk, on behalf of the defendant members of the Norfolk Electoral Board, Andre Evans, Commonwealth's Attorney of Virginia Beach, on behalf of the defendant members of the Virginia Beach Electoral Board, and Henry E. Howell, Jr., on behalf of himself and the other plaintiffs named herein, as follows:

1. That Senator Hunter B. Andrews on November 17, 1970, acting on behalf of the Senate Privileges and Elec-

tions Subcommittee designated to make recommendations to the full committee regarding the reapportionment of the Senate of Virginia, wrote to Senator Edward L. Breeden, Jr., with a copy to Senators Henry E. Howell, Jr., Peter K. Babalas and Edward T. Caton, III, requesting those four Senators to consider whether the four Senators preferred:

"(1) Four (4) Senators at large from the new proposed 2nd district;

(2) Two (2) Senators from a portion of the City of Norfolk, having a population of approximately 229,000, and one (1) Senator from the City of Virginia Beach in an area having 114,000 plus, with the overage remaining from Norfolk and the City of Virginia Beach being laid off in new boundaries as a separate senatorial district; or

(3) Separate senatorial districts laid off based upon Census Enumeration Tracts for each of the four (4) senators."

2. The following documents may be admitted into evidence without formal proof:

(a) The geographical description of Senatorial Districts Fifth, Sixth and Seventh as set out in Exhibit "A" attached to the complaint.

(b) The 1970 population count for Norfolk, Virginia by census tracts as set out on Exhibit "B" of said complaint.

(c) The 1970 population count for Virginia Beach, Virginia by census tracts as set out on Exhibit "C" of said complaint.

(d) The maps demarcating the geographical limits of Senatorial Districts Fifth, Sixth and Seventh, identified as Exhibit "D" and attached to the complaint herein.

(e) Affidavit of Bernard L. Michel and letter of Rear Admiral J. O. Cobb, dated February 12, 1971, both designated as Exhibit "E" and attached to the complaint herein.

(f) Population of respective Senatorial Districts designated as Exhibit "G" and attached to this complaint.

(g) Affidavit of Professor T. J. Reed, dated March 10, 1971, and the letter of J. O. Cobb dated March 2, 1971, attached thereto, notice of the Office of the Comptroller dated February 12, the census instruction sheet, form D-323, the instructions for enumeration of personnel assigned to U.S. Military and Coast Guard Vessels, all attached to the affidavit of Professor T. J. Reed, and made a part of the petition for temporary restraining order filed herein.

(h) Letter of March 5, 1971, of Conrad Taeuber, Associate Director, Bureau of the Census, together with his tabulation of home ported vessels berthed in the Tidewaters of Virginia and Census advance report PC(V2)-48.

(i) Census document numbered PC(V1)-48.

(j) Letter of Henry E. Howell, Jr., dated February 22, 1971, to Mrs. Leslie C. Curdts, General Registrar of the City of Norfolk, and her reply of February 23, 1971, including her records regarding the total number of registered voters by precincts as of January 1, 1971, and the last records available on registration by race in the precincts of the City of Norfolk.

3. All stipulations herein as to documents are for the purpose of simplifying procedures and obviating the neces-

sity of any party having to authenticate any such document. No stipulation herein made is to be taken as an admission that any such document or fact is relevant or material, or is to be accorded any particular effect or weight. Each party reserves the right to introduce such additional evidence, depositions, testimony or affidavits as the rules and this Court will permit.

4. It is stipulated that if called to testify, Mrs. Leslie C. Curdts, General Registrar of the City of Norfolk, Virginia, would testify that the cost of a primary election in the City of Norfolk is in excess of $15,000.00.

Dated this 31st day of March, 1971.

PLAINTIFFS' EXHIBIT 2

U.S. Department Of Commerce
Bureau of the Census
Washington, D. C. 20233

1970 Population Counts For Norfolk, Virginia
By Census Tracts

Tract	Population Counts	Tract	Population Counts
0009	13427	0020	1765
000999	36693	0021	2477
003999	113	0022	1283
004799	78	0023	2427
005099	37	0024	3464
0061	1881	0025	4436
0067	20	0026	2674
0001	2683	0027	5041
0002	6623	0028	4658
0003	3109	0029	8432
0004	3137	0030	2388
0005	3632	0031	3018
0006	4701	0032	2767
0007	3019	0033	2587
0008	3047	0034	2793
0009	10	003501	4476
0011	1633	003502	2818
0012	3578	0036	2385
0013	2852	0037	2518
0014	1756	0038	2657
0015	2358	0039	657
0016	2021	004001	2869
0017	2328	004002	3216
0018	1140	0041	2798
0019	778	0042	3281

Tract	Population Counts	Tract	Population Counts
0043	4072	0060	4034
0044	4250	0061	5310
0045	3418	0062	3404
0046	3466	0063	14
0047	2623	0064	3946
0048	1863	006501	2623
0049	1464	006502	2825
0050	3482	006601	2322
0051	1712	006602	3649
0052	5043	006603	3521
0053	2854	006604	2462
0055	3137	006605	3156
005601	4816	006606	5105
005602	3961	006607	3832
005701	4728	0067	602
005702	3604	0069	1806
0058	2793	006901	3192
005901	3211	006902	2132
005902	3851	007001	1466
005903	5433	007002	4230

PLAINTIFFS' EXHIBIT 3

U.S. Department Of Commerce
Bureau of the Census
Washington, D. C. 20233

1970 Population Counts For Virginia Beach, Virginia
By Census Tracts

Tract	Population Counts	Tract	Population Counts
0400	2087	0420	844
040099	5642	0422	5777
0418	851	0424	5854
0432	1585	0426	1682
0448	361	0428	10321
0450	4218	0430	4575
0452	1529	0432	22
0454	4383	0434	1744
0460	464	0436	1703
0462	1911	0438	3303
0464	2710	0440	9464
0466	801	0442	3409
0402	2649	0444	3137
0404	3877	0446	3619
0406	1247	0448	7624
0408	7793	0454	5960
0410	12488	0456	3654
0412	5841	0458	6757
0414	3020	0460	13681
0416	2042	0462	8573
0418	4904		

PLAINTIFFS' EXHIBIT 5

Affidavit Of Bernard L. Michel Dated February 13, 1971

Affidavit

State Of Virginia,
City of Norfolk, to-wit:

This day personally appeared before me, Catherine J. Crane, a Notary Public of and for the City aforesaid in the State of Virginia, whose commission expires on the 11th day of November, 1973, Bernard L. Michel, who after being by me first duly sworn, deposed and said as follows:

1. At the present time I am Management Assistance Officer for the Commandant of the Fifth Naval District.

2. I have had a total of 35 years experience as a Naval civil service employee and of those 35 years, 21 years has been with the Fifth Naval District at Norfolk.

3. Included in the scope of my responsibility is the necessity for being prepared to advise the Commandant with reference to management improvement, organization, personnel matters and being familiar with and employing statistics relating to matters of concern to the Commandant, including statistics relating to Naval personnel. I have to regularly deal with statistics relating to how many ships are home ported at Norfolk, how many aircraft squadrons are located in this area and how many occupy government quarters.

4. At the request of Senator Henry Howell, Rear Admiral J. O. Cobb, United States Navy, Commandant Fifth Naval District, prepared a letter relating to the living habits of men assigned to the Atlantic Fleet, which letter I delivered to Senator Howell. I am familiar with the letter and the content thereof.

5. Senator Howell has furnished me a Bill captioned "Committee Amendment In the Nature Of A Substitute For Senate Bill No. 54." I have looked at the Fifth District and the description thereof, along with the description of Senate Districts Six and Seven, and he has shown me an Esso map of the Norfolk-Portsmouth area and I have looked at it and ascertained that the map has outlined on it those districts. I have lived in Norfolk approximately 21 years and I am thoroughly familiar with Norfolk and the areas involved.

6. As is noted in Admiral Cobb's letter to Senator Howell dated 12 February 1971, the rule of thumb that is used by the Commander in Chief, Atlantic Fleet Headquarters, is that Fifty (50%) per cent of the men that are aboard ships home ported in Norfolk occupy housing units ashore. These men, many of whom are married, live in housing units scattered throughout the Greater Norfolk Area.

7. Once we exclude the housing units located on government property within the area described as the Fifth Senatorial District, which includes Benmorrel, such housing as bachelor officers' and enlisted mens' quarters and the Armed Forces Staff College, we would find that only a small percentage of the approximately Fifty (50%) per cent of the men assigned to ships home ported in Norfolk and who live ashore living in the remainder of the area containing private and civilian housing within the Fifth Senatorial District.

8. Senator Howell has shown me a census figure that he states was obtained from state officials, which shows 36,693 men assigned to ships home ported in Norfolk, and I have no reason to dispute that figure.

9. I have had an opportunity to examine the census tract designated as No. 9 within the City of Norfolk, and included in census tract 9 is the government owned prop-

erty designated as the United States Naval Station, the United States Naval Air Station, the Supreme Allied Command Atlantic Headquarters, the Armed Forces Staff College and Benmorrel, which is enlisted men's family housing units, among other Naval facilities.

And further this deponent saith not.

/s/ Bernard L. Michel
Bernard L. Michel

Given Under My Hand this 13th day of February, 1971.

/s/ Catherine J. Crane
Notary Public

PLAINTIFFS' EXHIBIT 6

Commandant Fifth Naval District
Commander, Naval Base
Norfolk, Virginia 23511

12 February 1971

Honorable Henry E. Howell, Jr.
Virginia Senate
State Capitol
Richmond, Virginia 23219

Dear Mr. Howell:

In response to your telephone request of this headquarters, the following information is furnished: The only figures available as to how many navy personnel attached to ships homeported at the Norfolk Naval Station live ashore is the "rule of thumb" used by the Commander in Chief, Atlantic Fleet Headquarters, which indicates that 50% of the men assigned to Atlantic Fleet afloat units occupy housing ashore near the home port of the ship.

In addition, there are approximately 7600 men living in bachelor quarters on Navy property and an additional 2400 Navy men living in government housing family units in the Norfolk area. However; figures as to the number of dependents residing with these 2400 Navy men are not readily available.

If I may be of any further assistance please to not hesitate to call on me.

Sincerely yours,

/s/ J. O. Cobb
J. O. Cobb
Rear Admiral, U.S. Navy
Commandant Fifth Naval District

PLAINTIFFS' EXHIBIT 7

COMFIVE/COMNAVBASE NORVA Instruction 5726.4A dated June 3, 1970

Commandant, Fifth Naval District
Commander, Naval Base
Norfolk, Virginia 23511

COMFIVE/COMNAVBASE
NORVA INST 5726.4A
Code 07
3 June 1970

COMFIVE/COMNAVBASE NORVA Instruction 5726.4A

From: Commandant, Fifth Naval District/Commander Naval Base, Norfolk

To: Distribution List

Subj: Admission of persons to a naval shore installation for the purpose of soliciting political support

Ref: (a) DOD Directive Number 5410.18 of 9 Feb. 1968, Subj: "Community Relations"

(b) 18 U.S. Code, sec. 1382

1. *Purpose.* To prescribe uniform rules governing the admission of political candidates or their supporters to naval shore installations within the Fifth Naval District.

2. *Cancellation.* COMFIVEINST 5726.4 is hereby cancelled and superseded.

3. *Background.* Paragraph IV.C. of reference (a) contains the following policy guidance:

"Department of Defense participation and cooperation must not directly or indirectly (a) endorse or selectively benefit or favor, or appear to endorse or selectively benefit or favor, any private individual, sect, fraternal organization, commercial venture, or political group, or (b) be associated with solicitation of votes in a political election."

In view of this policy, it is desirable that requests for permission to enter naval shore installations for the purpose of soliciting political support be treated uniformly throughout the Fifth Naval District.

4. *Action.* Commanding officers and officers-in-charge of naval shore installations within the Fifth Naval District will ensure that the policy guidelines contained in paragraph IV.C. of reference (a) are implemented.

a. Persons seeking admission to a naval shore installation for the purpose of soliciting political support should be denied permission to enter.

b. Denial of permission should be accompanied by a reasonable explanation of the policy proclaimed in reference (a).

c. Attention is directed to the provisions of reference (b) in the case of persons who, having once been instructed not to enter a shore facility, disobey that instruction and enter the installation for the purpose of soliciting political support.

5. *Applicability.* This Instruction shall apply upon receipt to all Navy and Marine Corps shore installations within the Fifth Naval District.

/s/ J. C. Dempsey
J. C. Dempsey

Distribution (8/28/68)
List I
List II (only 16, 17, 19, 20, 21, 22)
List III
List IV (less 31-36)
List IX
List IX (only N124) (50 copies)
(525 copies)
Stocked by: COMFIVE Code N13

PLAINTIFFS' EXHIBIT 9

Affidavit of Professor T. J. Reed

State of Virginia,
City of Norfolk, to-wit:

This day personally appeared before me, Catherine J. Crane, a Notary Public of and for the City aforesaid in the State of Virginia, whose commission expires on the 11th day of November, 1973, Professor T. J. Reed, who after being by me first duly sworn, deposed and said as follows:

1. I am currently Associate Professor in the School of Business Administration of Old Dominion University, Norfolk, Virginia. I obtained a Bachelor of Science degree at the University of Arkansas in 1939 and a Master of Science degree in Economics and Statistics from Iowa State University in 1947. I have thirty years of professional experience in census and sample surveys. In 1940 I was employed by the United States Census Bureau in the Department of Commerce working in the 1940 census. From 1944 until 1948 while at the Iowa State University I was on a sampling project in which the Bureau of Census, the Department of Agriculture and the University were cooperating. I was engaged on three assignments relating to planning for, the taking of and a post enumeration survey to determine the reliability of the initial enumeration of the 1950 census. I made statistical analyses and testified regarding the malapportionment of Virginia's Congressional Districts in the suit of Wilkins v. Davis filed in the Surpeme Court of Virginia in 1964. I have engaged in statistical studies and surveys relating to the use of census data for business and governmental agencies. For the last three years by appointment of the Secretary of Commerce I have served as Executive Reservist in the Census Unit of the National

Defense Executive Reserve. In summary, I have received training and have worked with the application of statistics and census data off and on for approximately thirty years.

2. In the latter part of February, 1971, I attended certain hearings of the Senate Privileges and Elections Committee and the session of the Senate of Virginia on the day the plan for redistricting and apportioning the Senate of Virginia was debated. As a result of these sessions I became familiar with the lines of demarcation for Senatorial Districts Fifth, Sixth and Seventh, among others.

3. I have obtained and worked with the census enumeration by tracts for the cities of Norfolk, Virginia Beach, Chesapeake and Portsmouth, Virginia.

4. I have made a detailed study of the location of the residences of the 36,693 naval personnel stationed aboard ships home ported at Norfolk enumerated in census tract 9.99, sometimes referred to as tract 000999.

5. I acquainted Henry Howell with the fact that in April of 1970 the month the 1970 census was taken there was taken a survey through the Command of the Fifth Naval District of where naval personnel stationed in Norfolk, whether aboard ships or otherwise, actually lived, and requested that for the purpose of my study Mr. Howell obtain this information from the Commandant of the Fifth Naval District with respect to where naval personnel live while attached to ships home ported at the Naval Station, Norfolk. There is attached to this affidavit a copy of a letter dated 2 March 1971, addressed to Senator Howell by Rear Admiral J. O. Cobb, Commandant, Fifth Naval District, which provided the needed data. I approve from a statistical standpoint the adequacy of the sampling size

used by the Secretary of Defense for the survey referred to, namely, 543 individuals.

6. I have studied and analyzed the statistics furnished in Admiral Cobb's letter referred to and have reached the following conclusions:

Of the total of 36,693 enumerated and allocated to the population constituting the Fifth Senatorial District of 116,084 Fifty Nine (59%) Per Cent or approximately 21,600 of said personnel maintain local residences outside the Fifth Senatorial District. This reduces the number of persons residing in the Fifth Senatorial District to 94,484.

7. Individuals are assigned to census tracts by the United States Bureau of Census on the assumption that the individual lives within the tract to which he is assigned. In the case of Navy personnel assigned to vessels, the Bureau of Census has assumed for its purposes that said personnel not only work, but live on the vessels. It has been established that for the purpose of legislative apportionment this is an erroneous assumption, for approximately 21,600 individuals should not have been included in census tract 9.99 for the reasons above, namely, they do not live in the census tract and, in fact, lived outside of the geographical limits of Senatorial District Five. Notwithstanding this fact, the legislative act which redistricted and apportioned Senators in Norfolk, assigned the entire enumeration of 36,693 persons to Senatorial District Five.

8. I have concluded that approximately 8,450 naval personnel stationed aboard vessels home ported at the Norfolk Naval Base actually live aboard the vessels. In addition, there has been enumerated 13,427 naval personnel, including dependents, in what is designated as census tract 9.

These individuals live in military housing located on government property. In my opinion the only way to diffuse the impact of the approximately 50,120 people that have been allocated by the state legislature for reapportionment purposes to the Fifth Senatorial District, which includes 21,600 persons who do not live within the district, and others who cannot be reached in normal campaign procedures and processes would have to be represented by Senators elected on an At Large basis, which has been the historic method in the City of Norfolk.

And further this deponent saith not.

/s/ T. J. Reed

Given under my hand this 10th day of March, 1971.

/s/ Catherine J. Crane
Notary Public

PLAINTIFFS' EXHIBIT 10

Letter of J. O. Cobb, Rear Admiral, U.S. Navy, Commandant, Fifth Naval District addressed to Honorable Henry E. Howell, Jr., dated 2 March 1971, with attachments:

(a) NAVCOMPT NOTICE 5740, Comptroller of the Navy dated 12 Feb. 1970. Instructions.

(b) U.S. Department of Commerce form D-323– Enumeration Control U.S. Military and Coast Guard Crews of Vessels.

(c) U.S. Department of Commerce form "Request" for Additional Census Materials:

Commandant Fifth Naval District
Commander, Naval Base
Norfolk, Virginia 23511

Honorable Henry E. Howell, Jr.
Virginia Senate
808 Maritime Tower
Norfolk, Va. 23510

Dear Mr. Howell:

Reference is made to your letter of 22 February 1971 in which you requested certain statistics and information concerning the 1970 Census which was taken aboard ships homeported in Norfolk. In this regard the following information is furnished:

a. The census taking aboard ships was handled between the Census Bureau and the commanding officers of ships. Department of the Navy, Office of the Comptroller Notice 5740 of 12 February 1970, a copy of which is attached, furnishes information in this regard.

b. As suggested in your letter, it has been found that the Navy Housing Survey conducted in 1970 provides the most reliable information available concerning the areas where Navy personnel live while attached to ships homeported at Naval Station, Norfolk. These housing surveys are conducted for the purpose of obtaining current and valid information on family housing requirements at Navy shore activities. The sampling method survey (SAMS) technique used in the study was field tested in other locations in the previous year and has now been approved by the Office of the Secretary of Defense for expanded use in forthcoming surveys. It is indicated that the SAMS system offers the advantage of reduced manpower and compressed timeframe, while providing results which are as good as, or slightly better than the system previously used wherein all personnel having a requirement for housing were required to be included in the survey.

c. The SAMS method was conducted as follows: a listing of a representative group of personnel, officers and enlisted, attached to various types of ships in a particular area was furnished the ships for completion by the individuals concerned. A compilation of the results of the sampling survey of ships homeported at Naval Station, Norfolk in April 1970 indicates the following numbers of personnel entitled to Basic Allowance for Quarters living on board ships or in the various Zip Code areas:

On board ships = 125

Zip Codes	Zip Codes	Zip Codes	Zip Codes
23501 = 2	23513 = 32	23455 = 21	23321 = 1
23502 = 18	23517 = 5	23462 = 18	23322 = 1
23503 = 74	23518 = 57	23701 = 6	23323 = 3
23504 = 3	23525 = 1	23702 = 12	23325 = 5
23505 = 47	23400 = 1	23703 = 3	23366 = 1
23507 = 3	23402 = 1	23704 = 3	23369 = 1
23508 = 14	23451 = 4	23707 = 4	23601 = 3
23509 = 18	23452 = 30	23709 = 1	23602 = 2
23510 = 1	23453 = 1	23710 = 1	23605 = 2
23511 = 3	23454 = 5	23320 = 9	23606 = 1
			23607 = 1

Total sample size: 544

Unfortunately, I am unable to assist you in your request to interview a representative group of men assigned to ships who, in April of 1970, resided in Senatorial Districts Six and Seven.

The Bureau of Naval Personnel advises that the serviceman's off-duty hours in civilian domain are considered private affairs and as such, the policy of the Bureau is not to release personal information such as home addresses unless specifically authorized by the serviceman himself. To do otherwise could be considered an invasion of their privacy. Should you desire to pursue this matter at a higher level, I suggest you contact the following individual:

Assistant Vice Chief of Naval Operations and
Director of Naval Administration
Navy Department
Washington, D. C. 20360

I regret that my answer to this portion of your letter is not more favorable.

Sincerely yours,

/s/ J. O. Cobb
Rear Admiral, U.S. Navy
Commandant Fifth Naval District

Encl:
(1) NAVCOMPT NOTE 5740
of 12 Feb 1970

Department of the Navy
Office of the Comptroller
Washington, D.C. 20350

In Reply Refer to
NAVCOMPTNOTE 5740
NCB-222
NCB 93-70
12 Feb 1970

NAVCOMPT NOTICE 5740

From: Comptroller of the Navy

To: Distribution List

Subj: 1970 Census Enumeration of Personnel Assigned to U.S. Naval Ships

Encl: (1) Instructions for Enumeration of Personnel Assigned to U.S. Military and Coast Guard Vessels in the 1970 Census of Population

1. *Purpose.* To transmit enclosure (1) for action.

2. *Scope.* This Notice applies to all Active Fleet ships of

the Navy and to all ships of the nucleus fleet of the Military Sea Transportation Service.

3. *Background.* The Decennial Census is required by Article I, Section 2 of the Constitution of the United States. The Secretary of Defense has pledged full cooperation with the Bureau of the Census and agreed that the military services would conduct their own enumeration. NAVCOMPT. NOTE 5740 (NCB 87-70) of 29 January 1970 was issued to alert all ships and stations that the 1970 Census would be taken 1 April 1970. The Bureau of the Census will make direct shipment of questionnaires in February.

4. *Action.* Each action addressee will be responsible for the following:

a. The commanding officer of each ship will designate a project officer who will be responsible for the enumeration.

b. If no forms have been received by 1 March 1970, they should be requested from the Bureau of the Census, 1201 East 10th Street, Jeffersonville, Ind. 47130.

c. The conduct of the Census enumeration should be confined to the objectives of enclosure (1).

d. Additional instructions on how to fill out the forms should not be given without prior approval of the Bureau of the Census.

e. Any ships that may have participated in the procedural test at the Key West Naval Base must also comply with these instructions.

f. All persons arriving on the ship for 30 days following the census should be queried whether they have been enumerated.

g. Dependents of all personnel assigned to ships will be excluded from this enumeration. These dependents will be enumerated where they are residing.

COPY BOUN

h. At the conclusion of the enumeration all forms should be packaged and returned to the Bureau of the Census by air mail (see par. 4b).

5. *Point of contact.* If the ships project officer is unable to get his supply of forms from the Bureau of the Census he may call his point of contact in Washington, D. C. as follows:

Command	*Project Officer*	*Commercial Telephone*
CINCLANTFLT, CINCPACFLT and CINCUSNAVEUR	CDR Frank Pavlisin	OX-61035
Military Sea Transportation Service	Lt. William A. Callis	OX-69231

Area code for commercial calls to all "OX" numbers is 202. The above persons can be reached on AUTOVON by substitution of "22" for "OX."

6. *Cancellation.* 30 June 1970.

/s/ W. D. Gaddis
Director of Budget and Reports

Distribution: (2 copies each)
SNDL Part 1: 29, 30, 31, 32, 33, 35 and 36
Annex A

Copy to:
SNDL Part 1: 21, and 41A
Part 2: A3 (OP09B28, 2 cys)
Ref: OPNAVINST 5215.9A
E2D (GLakes only) Code 1B

CLOSE IN CENTER

INSTRUCTIONS – Complete this form and return with completed questionnaires no later than April 15, 1970.

1. Name of vessel	
2. Number of personnel assigned	3. Number of questionnaires completed
4. Name of person completing this report	5. Rank

Form D-323 (6-22-69)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

ENUMERATION CONTROL
U.S. MILITARY AND COAST GUARD CREWS OF VESSELS
19th Decennial Census – 1970

REQUEST FOR ADDITIONAL CENSUS MATERIALS

Form	Quantity	
D-6		Military Household Mailing Pieces – includes questionnaire, instructions, and return envelope
D-7 △		
D-8 ●		
D-1		- Questionnaire for transcribing group quarters personnel
D-21		- Military Individual Census Report
D-167		- Address Register

Name of installation or vessel

Mailing address *(Include ZIP code)*

Name of person requesting forms

USCOMM-DC

PLAINTIFFS' EXHIBIT 11

Letter of Conrad Taeuber, Associate Director, Bureau of the Census addressed to Honorable Henry E. Howell, Jr., dated March 5, 1971:

U.S. Department of Commerce
Bureau of the Census
Washington, D.C. 20233
Office of the Director

March 5, 1971

Honorable Henry E. Howell, Jr.
Virginia State Senate
808 Maritime Tower
Norfolk, Virginia 23510

Dear Mr. Howell:

In response to your telephone request to Dr. Sheldon of our Population Division, I am enclosing a list of Naval vessels and their components home ported in the Norfolk area. This list was initially furnished to Mr. Shropshire, Clerk of the House and Senate Privileges and Elections Committee.

I am also enclosing a copy of the PC(V2)-48 which presents statistics on Negroes for Virginia cities.

Sincerely,

/s/ Conrad Taeuber
Associate Director
Bureau of the Census
Enclosures

PLAINTIFFS' EXHIBIT 12

List of Ships Home Ported at Norfolk
(attachment to letter of Conrad Taeuber (11))
1970 Decennial Census

Ships Berthed in Tidewaters of Virginia

Naval Vessel	Location	Pop. Count
Shenandoah	Norfolk	315
Sierra	Norfolk	697
Tidewater	Norfolk	618
Butte	Norfolk	303
Diamond Head	Norfolk	210
Arcturus	Norfolk	204
Dene Bola	Norfolk	216
Zelima	Norfolk	203
Concord	Norfolk	251
Sylvania	Norfolk	362
Aucilla	Norfolk	237
Canisteo	Norfolk	354
Chuckawan	Norfolk	245
Truckee	Norfolk	289
Seattle	Norfolk	615
Amphion	Norfolk	705
Vulcan	Norfolk	439
L.Y. Spear	Norfolk	936
Orion	Norfolk	678
Kittiwake	Norfolk	90
Sagamore	Norfolk	21
Newport News	Norfolk	939
Northampton	Norfolk	200
Wright	Norfolk	770
Columbus	Norfolk	1,122
Springfield	Norfolk	1,090

Naval Vessel	Location	Pop. Count
America	Norfolk	1,207
Independence	Norfolk	2,068
John F. Kennedy	Norfolk	2,565
Enterprise	Norfolk	3,098
Yorktown	Norfolk	1,013
Damato	Norfolk	228
Dupont	Norfolk	93
Fred T. Berry	Norfolk	256
Furse	Norfolk	243
Harold J. Ellison	Norfolk	154
Hawkins	Norfolk	272
Henley	Norfolk	100
Laffey	Norfolk	296
Leary	Norfolk	266
Mullinnix	Norfolk	292
New	Norfolk	272
Rich	Norfolk	285
Robert A. Owens	Norfolk	273
Steinaker	Norfolk	262
Stickell	Norfolk	243
Stormes	Norfolk	241
Vogel Gesang	Norfolk	146
Willard Keith	Norfolk	152
Barney	Norfolk	177
Claude U. Ricketts	Norfolk	339
Conyngham	Norfolk	331
Mitscher	Norfolk	355
Richard F. Byrd	Norfolk	283
Connole	Norfolk	224
Dahlgren	Norfolk	389
Docono	Norfolk	481
Arned	Norfolk	237
Capricornus	Norfolk	45

Naval Vessel	Location	Pop. Count
Charleton	Norfolk	330
El Paso	Norfolk	268
Muliphen	Norfolk	249
Rankin	Norfolk	239
Vermillion	Norfolk	331
Yancey	Norfolk	274
Cambria	Norfolk	334
Chilton	Norfolk	389
Francis Marion	Norfolk	413
Austin	Norfolk	414
Coronado	Norfolk	125
La Salle	Norfolk	404
Nashville	Norfolk	414
Raleigh	Norfolk	298
Guadalcanal	Norfolk	546
Guam	Norfolk	606
Inchon	Norfolk	352
Grampus	Norfolk	77
Sea Leopard	Norfolk	82
Sirago	Norfolk	54
Finback	Norfolk	105
Flying Fish	Norfolk	133
Hammerhead	Norfolk	109
Lapon	Norfolk	86
Ray	Norfolk	111
Sea Devil	Norfolk	93
Shark	Norfolk	108
Skipjack	Norfolk	98
Spadefish	Norfolk	68
Nespelen	NAB Little Creek-Va. Beach	70
Noxubee	NAB Little Creek-Va. Beach	102
Hoist	NAB Little Creek-Va. Beach	69
Opportune	NAB Little Creek-Va. Beach	72

Naval Vessel	Location	Pop. Count
Preserver	NAB Little Creek-Va. Beach	85
Recovery	NAB Little Creek-Va. Beach	81
Accokkeek	NAB Little Creek-Va. Beach	39
Atakapa	NAB Little Creek-Va. Beach	69
Kiowa	NAB Little Creek-Va. Beach	68
Mosopelea	NAB Little Creek-Va. Beach	63
Papago	NAB Little Creek-Va. Beach	74
Seneca	NAB Little Creek-Va. Beach	76
Shakori	NAB Little Creek-Va. Beach	65
Utina	NAB Little Creek-Va. Beach	68
Donner	NAB Little Creek-Va. Beach	263
Fort Mandan	NAB Little Creek-Va. Beach	233
Fort Snelling	NAB Little Creek-Va. Beach	250
Hermitage	NAB Little Creek-Va. Beach	289
Plymouth Rock	NAB Little Creek-Va. Beach	282
Rushmore	NAB Little Creek-Va. Beach	198
San Marcos	NAB Little Creek-Va. Beach	319
Spiegel Grove	NAB Little Creek-Va. Beach	446
De Soto County	NAB Little Creek-Va. Beach	132
Graham County	NAB Little Creek-Va. Beach	165
Grant County	NAB Little Creek-Va. Beach	135
Lorain County	NAB Little Creek-Va. Beach	190
Newport	NAB Little Creek-Va. Beach	193
Suffolk County	NAB Little Creek-Va. Beach	160
Terrebonne Parish	NAB Little Creek-Va. Beach	158
Traverse County	NAB Little Creek-Va. Beach	160
Wahkiakum County	NAB Little Creek-Va. Beach	407
Waldo County	NAB Little Creek-Va. Beach	144
Walworth County	NAB Little Creek-Va. Beach	135
Wood County	NAB Little Creek-Va. Beach	169
York County	NAB Little Creek-Va. Beach	120
Nathaniel Greene	Newport News	206
	Total	41,860

Coast Guard Vessel	Location	Pop. Count
Cuyahoga	Yorktown	40
Tanager	Yorktown	57
Capstan	Alexandria	5
Absecon	Norfolk	143
Chincoteague	Norfolk	70
Ingham	Norfolk	137
Point Brown	Norfolk	10
Chock	Norfolk	4
Point Arena	NAB Little Creek-Va. Beach	8
Point Huron	NAB Little Creek-Va. Beach	8
Conifer	Portsmouth	47
Madrona	Portsmouth	45
Barberry	Portsmouth	8
Narcissus	Portsmouth	18
Sledge	Portsmouth	10
Courier	Yorktown	96
	Total	706

Maritime Vessel	Location	Pop. Count
USNS Kane	Norfolk	21
USNS Bondia	Norfolk	39
SS Louisiana Getty	Newport News	26
SS Esso Gettysburg	Newport News	31
SS Austral Pilot	Norfolk	40
SS Atlantic Communicator	Norfolk	33
SS Esso Chester	Norfolk	32
SS Prudential Seajet	Norfolk	40
SS Exbrook	Norfolk	49
SS Fra Berlanga	Norfolk	3
SS Flying Clipper	Norfolk	3
USNS Shawnee Trail	Yorktown	40
	Total	357

PLAINTIFFS' EXHIBIT 13

1970 Census of Population, Advance Report, PC(V2)-48,
(attachment to letter of Conrad Taeuber (11):

1970 Census of Population
U.S. Department of Commerce/Bureau of the Census
Advance Report
PC(V2)-48
Virginia

General Population Characteristics

(This series consists of 52 reports—number 1 for the United States and numbers 2 through 52 for the States and the District of Columbia in alphabetical order rather than order of publication.)

This report presents 1970 census statistics on the basic demographic characteristics of the inhabitants of the State. Data on age, sex, race, and relationship to head of household are shown for the State, each standard metropolitan statistical area, each place of 10,000 inhabitants or more, and each county or comparable area.

The data presented here are being issued in advance of their publication in Final Report Series PC(1)-B, which will provide additional information on the population characteristics of the inhabitants of the State. The final report for this State will be published in about 2 months.

Statistics on selected housing characteristics for the areas shown in this report are currently being issued in Advance Report Series HC(V1). An outline of the publication program for the 1970 Census of Population and Housing can be obtained free of charge from the Bureau of the Census, Washington, D.C. 20233, or any U.S. Department of Commerce Field Office.

The State SMSA's Places of 10,000 or More Counties

	The State	Norfolk-Portsmouth	Norfolk City
Race			
All races	4,648,494	680,600	307,951
White	3,757,478	504,444	215,055
Negro	865,388	167,970	87,275
Other	25,628	8,186	5,621
Age			
Total male, all ages	2,296,498	353,791	166,453
Under 5 years	199,669	29,993	13,018
5 and 6 years	91,334	13,781	5,637
7 to 9 years	141,169	21,247	8,172
10 to 13 years	193,769	28,383	10,587
14 years	47,451	6,726	2,571
15 years	46,257	6,350	2,393
16 and 17 years	88,909	12,195	4,949
18 and 19 years	89,852	16,914	9,280
20 years	50,221	14,830	9,749
21 years	49,113	15,433	10,470
22 to 24 years	132,361	30,442	19,349
25 to 34 years	307,028	47,414	22,372
35 to 44 years	269,861	38,025	15,474
45 to 54 years	258,249	34,596	14,469
55 to 59 years	101,762	12,066	5,518
60 to 61 years	35,382	4,157	1,982
62 to 64 years	45,111	5,087	2,385
65 to 74 years	99,771	11,180	5,563
75 years and over	49,229	4,972	2,515
Total female, all ages	2,351,996	326,809	141,498
Under 5 years	193,336	29,404	12,858

	The State	Norfolk-Portsmouth	Norfolk City
5 and 6 years	88,133	13,158	5,338
7 and 9 years	136,439	20,773	8,074
10 to 13 years	187,079	27,729	10,694
14 years	46,053	6,533	2,507
15 years	45,015	6,366	2,454
16 and 17 years	85,850	12,043	4,802
18 and 19 years	85,042	11,562	5,716
20 years	43,308	6,559	3,582
21 years	42,497	6,687	3,568
22 to 24 years	122,534	18,734	9,197
25 to 34 years	308,653	43,566	17,466
35 to 44 years	279,401	38,667	14,883
45 to 54 years	271,342	36,222	15,889
55 to 59 years	108,775	13,236	6,313
60 and 61 years	39,333	4,536	2,271
62 to 64 years	52,496	6,230	3,098
65 to 74 years	133,210	15,753	8,114
75 years and over	83,502	9,051	4,674
Negro male, all ages	420,847	81,158	42,340
Under 5 years	42,479	8,091	4,308
5 to 14 years	104,369	20,796	10,264
15 to 24 years	82,724	16,891	9,406
25 to 34 years	45,418	8,064	4,336
35 to 44 years	42,174	7,992	3,978
45 to 54 years	43,193	8,970	4,454
55 to 64 years	32,159	5,790	3,038
65 years and over	28,331	4,564	2,556
Negro female, all ages	444,541	86,812	44,935
Under 5 years	42,820	8,185	4,378
5 to 14 years	104,359	21,056	10,471
15 to 24 years	82,730	15,811	8,181
25 to 34 years	49,572	9,509	4,917

	The State	Norfolk-Portsmouth	Norfolk City
35 to 44 years	48,418	9,721	4,904
45 to 54 years	45,924	9,736	4,971
55 to 64 years	34,207	6,608	3,637
65 years and over	36,511	6,186	3,476
Relationship to Head of Household			
Total population	4,648,494	680,600	307,951
In households	4,452,408	620,781	263,285
Head	1,390,227	191,547	86,746
Primary individual	232,043	31,371	17,807
Family head, Male	1,027,688	136,901	56,496
Female	130,496	23,275	12,443
Wife of head	996,282	132,865	54,465
Other relative of head	1,986,342	285,093	116,178
Not related to head	79,557	11,276	5,896
In group quarters	196,086	59,819	44,666
Inmate of institution	45,943	2,457	1,102
Other	150,143	57,362	43,564
Negro population	865,388	167,970	87,275
In households	830,837	161,695	82,901
Head	220,067	44,535	23,907
Primary individual	39,299	8,698	5,293
Family head, Male	137,875	26,060	12,784
Female	42,893	9,777	5,830
Wife of head	128,464	24,303	11,768
Other relative of head	459,448	86,277	44,467
Not related to head	22,858	4,580	2,759
In group quarters	34,551	6,275	4,374
Inmate of institution	15,294	996	505
Other	19,257	5,279	3,869

PLAINTIFFS' EXHIBIT 15

Letter of Henry Howwell to Mrs. Leslie Curdts, Registrar, City of Norfolk, dated February 22, 1971:

Commonwealth of Virginia
Senate
February 22, 1971
Dictated February 21, 1971

Mrs. Leslie Curdts
Registrar
City of Norfolk
City Hall
Norfolk, Virginia 23510

Dear Mrs. Curdts:

I would like the most up to date information we have regarding the total number of qualified voters in each of the voting precincts in the City of Norfolk.

I would also like the latest available breakdown by precincts and in the aggregate of White and non-White voters. I realize that this type of information may have been stopped some years ago, but I would like the latest available information.

If you will call my office as soon as this information is available, my Secretary, Mrs. Crane, will arrange for it to be picked up.

Sincerely,

/s/ Henry Howell

PLAINTIFFS' EXHIBIT 16

Letter of Leslie C. Curdts, General Registrar, City o
Norfolk, Virginia, addressed to Honorable Henry E
Howell, Jr., dated February 23, 1971:

General Registrar
City of Norfolk
Virginia
February 23, 1971

Honorable Henry E. Howell, Jr.
808 Maritime Tower
Norfolk, Virginia 23510

Dear Sir:

I am enclosing the information requested in your lett
of February 22, 1971.

Yours very truly,

/s/ Leslie C. Curdts
General Registrar

PLAINTIFFS' EXHIBIT 17

Total number of Registered Voters by Precincts as of January 1, 1971, and last records available on registration by race in said precincts for the City of Norfolk, (attachment to letter of Leslie C. Curdts (16)):

Registered Voters as of January 1, 1971

Precinct No. 1	2024	Precinct No. 28	1937
Precinct No. 2	2128	Precinct No. 29	1234
Precinct No. 3	872	Precinct No. 30	1769
Precinct No. 4	3127	Precinct No. 31	1477
Precinct No. 5	1648	Precinct No. 32	1479
Precinct No. 6	1124	Precinct No. 33	1300
Precinct No. 7	1526	Precinct No. 34	1065
Precinct No. 8	3366	Precinct No. 35	1341
Precinct No. 9	942	Precinct No. 36	766
Precinct No. 10	2287	Precinct No. 37	1542
Precinct No. 11	1256	Precinct No. 38	1277
Precinct No. 12	1769	Precinct No. 39	2652
Precinct No. 13	1812	Precinct No. 40	1902
Precinct No. 14	1752	Precinct No. 42	2039
Precinct No. 15	1815	Precinct No. 43	1063
Precinct No. 16	1299	Precinct No. 44	1905
Precinct No. 17	1505	Precinct No. 45	1299
Precinct No. 18	887	Precinct No. 47	1799
Precinct No. 19	1729	Precinct No. 48	3610
Precinct No. 20	1903	Precinct No. 49	1334
Precinct No. 21	2814	Precinct No. 50	3097
Precinct No. 22	2491	Precinct No. 51	1115
Precinct No. 23	2293	Precinct No. 52	2637
Precinct No. 24	2033	Precinct No. 53	1424
Precinct No. 25	1538	Precinct No. 54	740
Precinct No. 26	741	Precinct No. 55	2137
Precinct No. 27	1824	Total	92,445

NOVEMBER 16, 1964

Precinct	White			Colored			Pct. Total
	State	Federal	Total	State	Federal	Total	
1st	334	24	358	650	476	1126	1484
2nd	105	3	108	865	453	1318	1426
3rd	313	38	351	144	138	282	633
4th	3	0	3	1648	789	2437	2440
5th	70	0	70	1071	410	1481	1551
6th	0	0	0	598	273	871	871
7th	75	0	75	906	295	1201	1276
8th	15	0	15	1658	819	2477	2492
9th	177	4	181	311	255	570	747
10th	1318	166	1484	73	99	172	1656
11th	1195	69	1264	1	0	1	1265
12th	1461	89	1550	0	0	0	1550
13th	1508	130	1638	47	85	132	1770
14th	996	92	1088	66	158	224	1312
15th	1604	132	1736	0	0	0	1736
16th	1134	102	1236	1	2	3	1239
17th	284	19	303	520	318	838	1141
18th	707	48	755	17	5	22	777
19th	1476	55	1531	1	0	1	1532
20th	1436	88	1524	1	0	1	1525
21st	2231	108	2339	81	32	113	2452
22nd	1091	105	1196	239	105	344	1540
23rd	1995	148	2143	2	0	2	2145
24th	1864	130	1994	41	22	63	2057
25th	753	16	769	379	63	442	1211
26th	411	6	417	0	0	0	417
27th	1608	143	1751	0	0	0	1751

Precinct	White			Colored			Pct. Total
	State	Federal	Total	State	Federal	Total	
28th	1985	145	2130	0	0	0	2130
29th	1135	99	1234	1	0	1	1235
30th	1130	112	1242	39	2	41	1283
31st	719	98	817	6	1	7	824
32nd	1083	71	1154	45	8	53	1207
33rd	666	60	726	0	0	0	726
34th	593	79	672	9	4	13	685
35th	968	69	1037	2	0	2	1039
36th	627	61	688	0	0	0	688
37th	1602	112	1714	0	0	0	1714
38th	797	106	903	0	0	0	903
39th	2315	174	2489	49	9	58	2547
40th	996	44	1040	9	1	10	1050
42nd	91	4	95	1108	324	1432	1527
43rd	849	102	951	1	0	1	952
44th	1186	155	1341	58	0	58	1399
45th	776	90	866	0	0	0	866
47th	772	103	875	0	0	0	875
48th	1789	276	2065	3	0	3	2068
49th	1442	54	1496	0	0	0	1496
50th	2115	218	2333	1	0	1	2334
51st	824	96	920	0	0	0	920
52nd	2161	145	2306	0	0	0	2306
53rd	971	121	1092	0	0	0	1092
54th	589	36	625	0	0	0	625
55th	2207	161	2368	0	0	0	2368

PLAINTIFFS' EXHIBIT 18

Letter of Hunter B. Andrews to Honorable Edward L. Breeden, Jr., dated 17 November 1970

Commonwealth of Virginia
Senate

November 17, 1970

The Honorable Edward L. Breeden, Jr.
1530 Virginia National Bank Building
Norfolk, Va. 23510

Dear Eddie:

On behalf of the Senate P & E Subcommittee concerned with reapportionment, I respectfully request that you kindly confer with Senators Howell, Babalas, and Caton relative to your comments and views on senatorial districts in the 2nd Congressional District.

The Senate Subcommittee composed of Senators Hutcheson, Hirst, Long, Manns, Barnes, and myself, have been meeting from time to time relative to procedures and confines of congressional and senatorial redistricting. We have had the advice of the Attorney General and in essence we must adhere to mathematical exactness. The full P & E Committee directed the Subcommittee to proceed on the principle of determining congressional districts as mathematically exact as possible and then to solicit the views of concerned senators in the tentative new congressional districts on their ideas on senatorial districts within the confines of the new congressional district.

I want to emphasize that all proposals are tentative in that congressional district ideas will be submitted to the full committee for their approval and, of course, they have to receive the approval of the House Committee. They are tentative to the further extent that the population figures we are using are the most recent from the Census Bureau; but, are not in anywise final, although in your area we have added the appropriate personnel from maritime vessels to the population in Norfolk and Virginia Beach.

I am enclosing copy of the latest tentative plan for congressional districts and you will notice it embraces the City of Norfolk with a population of 305,060, and a portion of the City of Virginia Beach with a population of 155,631, giving a total for the congressional district of 460,691, which is 0.5% more than mathematical exact norm of 458,618. Because the population of the City of Virginia Beach is 171,631, we tentatively suggest that in the southern portion of the City of Virginia Beach some 16,000 people be based in the 4th Congressional District. The exact boundaries of such area, obviously, are dependent upon receipt of the Census Enumeration Tracts.

Working within the new boundaries of the new proposed 2nd Congressional District, we ask that you as the Senior member from that area confer with Senators Howell, Babalas, and Caton, and make suggestions, if you desire, concerning the division of this area to accommodate four (4) senators. We would appreciate this information by November 29, and if you have any recommendations, would you kindly transmit them either to me or John Boatwright in Richmond.

In essence, our problem under the present format is that the City of Norfolk has a population of 305,060 which includes 36,729 shipboard personnel, and the exact mathe-

matical norm for a separate senatorial district would be 114,654. The part of the City of Virginia Beach in the proposed new 2nd district has 156,000. We would ask that you consider whether you four gentlemen prefer.

(1) Four (4) senators at large from the new proposed 2nd district;

(2) Two (2) senators from a portion of the City of Norfolk having a population of approximately 229,000, and one (1) senator from the City of Virginia Beach in an area having 114,000 ±, with the overage remaining from Norfolk and the City of Virginia Beach being laid off in new boundaries as a separate senatorial district; or

(3) Separate senatorial districts laid off based upon Census Enumeration Tracts for each of the four (4) senators.

I trust you appreciate the difficulty of our undertaking and the spirit of confidence in which this matter is presently proceeding as we have no final census figures or final approval by the full P & E Committee. The same inquiry is being made in other parts of the State relative to the suggested new congressional district lines.

Naturally, I will be glad to confer with you if you think I can be of any assistance, if you all desire.

In our studies to date, we have found that it is necessary in certain portions of the State to divide counties or cities to arrive at mathematical exactness for not only congressional district but senatorial districts within the same.

Under the resolution authorizing the study, we are supposed to have a report by December 1; but, we find this impossible as the Census Bureau cannot give us final census figures on the counties and cities until after that date, and

subsequent to those figures we need the Census Enumeration Tracts which cannot be obtained until the first part of January. However, we believe the present preliminary census figures are within working tolerances to arrive at a study takeoff point.

Kindest personal regards, I remain

Very truly yours,

Hunter B. Andrews, Chairman
Privileges & Elections Subcommittee
on Reapportionment

HBA:jlw
Enclosures

cc: The Honorable John B. Boatwright, Jr.
The Honorable Henry E. Howell, Jr.
The Honorable Peter K. Babalas
The Honorable Edward T. Caton, III

PLAINTIFFS' EXHIBIT 21

Letter of Secretary of Commerce, dated September 21 1967 addressed to Mr. Thomas J. Reed

The Secretary of Commerce
Washington, D.C. 20230

Sept. 21, 1967

Mr. Thomas J. Reed
Director, Bureau of Business Research
Old Dominion College
Box 6173
Norfolk, Virginia 23508

Dear Mr. Reed:

It is my pleasure to inform you that effective this date I formally designate you a member of the Bureau of the Census unit of the National Defense Executive Reserve for a period of three years. Your certificate of designation is enclosed.

In becoming a member of this essential preparedness organization, you have increased your country's capacity to survive and recover from a national emergency. Your willingness to assume this responsibility is most gratifying.

The orientation and training you will receive under this program will enable you to serve your country effectively and with distinction should the need for your services arise.

Sincerely yours,

/s/ A. B. Trowbridge
Secretary of Commerce

Enclosure

PLAINTIFFS' EXHIBIT 22

Letter of A. Ross Eckler, Director, Bureau of the Census, dated October 4, 1967, addressed to Mr. Thomas J. Reed

U.S. Department of Commerce

Bureau of the Census

Washington, D.C. 20233

Oct. 4. 1967

Mr. Thomas J. Reed
Director, Bureau of Business Research
Old Dominion College
Box 6173
Norfolk, Virginia 23508

Dr. Mr. Reed:

I am pleased to send you the enclosed official certificate and letter, signed by Secretary Trowbridge, designating you as a member of the Department of Commerce National Defense Executive Reserve.

Also enclosed is a copy of the *Fact Finder for the Nation* which may be of some interest to you. We will keep you informed by mail of developments relating to the National Defense Executive Reserve program and Census activities.

I am looking forward to meeting with you at the National Conference this month. This conference will help to explain to you the purpose and plans of the Executive Reserve and will help to orient you in the work of the Bureau of the Census.

Let me take this opportunity to thank you for your willingness to serve your Government and to welcome you as a member of the Census Bureau unit of the Executive Reserve.

Sincerely yours,

/s/ A. Ross Eckler
Director
Bureau of the Census

Enclosures

PLAINTIFFS' EXHIBIT 23

Certificate of Appointment of Thomas J. Reed as a member of the National Defense Executive Reserve, issued by the Secretary of Commerce

United States of America
Department of Commerce

Reposing special trust and confidence in the patriotism, fidelity, and ability of

Thomas J. Reed

I do hereby designate him a member of the National Defense Executive Reserve.

/s/ A. B. Trowbridge
Secretary of Commerce

PLAINTIFFS' EXHIBIT 24

Letter of R. F. Foeller, Key Census Person, Southeastern Virginia Regional Planning Commission dated March 4, 1966, addressed to Mr. Thomas J. Reed

Southeastern Virginia Regional Planning Commission

March 4, 1966

Mr. T. J. Reed, Associate Director
Bureau of Business Research
Old Dominion College—Chandler Hall
Hampton Boulevard
Norfolk, Virginia

Re: 1970 Census

Dear Mr. Reed:

As Key Census Person for the Southeastern Virginia Regional Area, I wish to revise the old Census Tract Committee and establish a new Census Advisory Council. The new Council will serve a broader area than the earlier Tract Committee and, through its Key Census Committee will explore various aspects of the Federal Census and guide future regional programs related thereto.

I would greatly appreciate your accepting this invitation to become a part of the Key Census Committee to help guide the region in matters relating to the federal census and other related surveys to be made in the region. If you are unable to participate, would you name an alternate to represent your interest.

I attach a list of those presently being invited to participate. The Committee may be expanded in the future. I would approciate your suggestions for expansion.

The Census Advisory Council will have a much larger representation. We will rely on the Key Committee to help develop this membership.

I look forward to your acceptance of this invitation and your help in formulating policy on the forthcoming census activity.

Our first meeting with U.S. Census officials will be held March 16th at 10:00 A.M. Kirn Library, Norfolk. Please mark your calendar. More details later.

Sincerely,

/s/ R. F. Foeller
"Key Census Person"

RFF:jce
Enclosure

PLAINTIFFS' EXHIBIT 25

Letter of May 11, 1967, addressed to Dr. A. Ross Eckler, Director, Bureau of Census by T. J. Reed

May 11, 1967

Dr. A. Ross Eckler, Director
Bureau of the Census
Washington, D.C. 20233

Dear Dr. Eckler:

We at Old Dominion College are interested in many programs of the Bureau of the Census and look forward with a great deal of interest to increased detail of content and flexibility of tabulation of the 1970 Census. We were glad to have one of the Regional Census Conferences meet on our campus last June.

Looking toward the 1970 Censuses of Population and Housing, I am prompted to express interest in additional information on employment; some further information on married females with husbands absent; and perhaps some breakdown of the rental housing by private ownership, public housing, and Government owned quarters.

In connection with employment, I would like to see more precise information on place of employment and hope that information will be available on the number of persons holding two or more jobs together with the occupational and income relationship of the multiple jobs held. We would like to have the place of employment localized to the Census tract or perhaps smaller area. This would provide some very useful information needed in study related to the Community Shelter Program and the journey to work. This Bureau is presently engaged in compiling information on employment density for the Regional Planning Commission.

In this area we need better information on Navy families. The enclose copy of a page from the Norfolk Statistical Digest indicates that at the time of the 1960 Census, there were some 47,000 Navy personnel aboard ships homeported here. Some of these had families living in this metropolitan area. The enclosed data indicate an estimated 7,817 such households. These households would be enumerated with a female head, the husband being enumerated aboard ship. In 1960, there were 36,000 female heads of households, which included some of the 23,000 married females with spouse absent. We would like very much to know how many of these cases had the usual head of house enumerated aboard ship and, in fact, are "Navy families."

In order to better present information relevant to the local housing market, I would like very much to see information available on the ownership of rental housing, for example, private ownership, public housing, and Government-owned quarters.

Some of the information outlined above would probably be available only through special tabulation, but I mention these needs based on my experiences in this area and because they relate to information gathered by the Bureau of the Census in the past.

Sincerely,

T. J. Reed, Director
Bureau of Business Research

TJR:vpf
Enclosures
cc Mr. Conrad Taeuber
bc R. F. Foeller

PLAINTIFFS' EXHIBIT 26

Letter of Herman P. Miller, Chief, Population Division Bureau of the Census, dated June 1, 1967, addressed to Mr. Thomas J. Reed

U.S. Department of Commerce
Bureau of the Census
Washington, D.C. 20233

June 1, 1967

Mr. T. J. Reed
Bureau of Business Research
Old Dominion College
Norfolk, Virginia

Dear Mr. Reed:

Thank you for your letter of May 11. We very much appreciate your interest in our plans for the 1970 Census.

It is true that we hope to have increased flexibility of tabulations in connection with the 1970 population and housing data. However, because of pressing limitations of space, costs, and burden to respondents, the schedule content will probably be very similar to that of 1960, with relatively minor changes to meet current needs. These do not include the items you mention on dual jobholders or on type of ownership of rental housing.

With reference to place of work data, we are studying the possibility of getting specific address of place of work and coding it to the appropriate block side. This approach could yield place of work data for tracts, traffic zones, etc. A number of agencies and individuals have strongly recommended that we proceed in this manner. However, there are a number of technical issues involved, such as the ability to

get adequate addresses for place of work, the detailed area for which statistics can be presented, and the limitations which are imposed by the requirement to maintain confidentiality. The cost of this item is relatively high and it is not at all clear that this can be included in the budget. Even if included, the cost of preparing local detailed trip tabulations would undoubtedly have to be borne by the agencies requesting the tabulations. The whole matter is currently under study.

The interest in "Navy families" is certainly understandable in an area such as Norfolk. However, to obtain the information you desire would require changes in the enumeration procedure for the entire country which do not appear to be feasible.

If you have any further comments, or suggestions on any other part of the Census Bureau's program, we would, of course, be happy to have them.

Sincerely yours,

/s/ Herman P. Miller
Chief, Population Division
Bureau of the Census

PLAINTIFFS' EXHIBIT 27

Information furnished by the Attorney General of Virginia to Attorney General of the United States

OLD Senate Districts—1970 Census—Population and Racial Breakdown

tricts	No. of Senators	Location	Total	White	Negro	Other
2	3	Norfolk	307,951	215,055	87,275	5,621
3	3	Chesapeake	89,580	68,569	20,682	329
		Portsmouth	110,963	65,992	44,325	646
		Virginia Beach	172,106	154,828	15,688	1,590
			327,649	289,389	80,695	2,565
5	1	Isle of Wight	18,285	9,243	9,018	24
		Nansemond	35,166	16,134	18,960	72
		Southampton	18,582	8,535	10,026	21
		Suffolk	9,858	6,190	3,643	25
		Franklin	6,880	3,380	3,491	9
			88,771	43,482	45,138	151
	1	Newport News	138,177	97,887	39,208	1,082
3	1	Hampton	120,779	89,376	30,619	784
	1	Charles City	6,158	1,081	4,536	541
		Chesterfield	76,855	68,012	8,651	192
		Amelia	7,592	3,985	3,587	20
		New Kent	5,300	2,917	2,338	45
		Colonial Heights	15,097	15,000	59	38
			111,002	90,995	19,171	836
	2	Richmond	249,621	143,857	104,766	998
	1	Henrico	154,364	143,812	10,106	446

NEW Senate Districts—1970 Census—Population and Racial Breakdown

Districts	No. of Senators	Location	Total	White	Negro	Ot
2	1	Part of Newport News	*115,675	77,939	36,845	
3	1	Accomack	29,004	18,086	10,854	
		James City	17,853	11,447	6,309	
		Northampton	14,442	6,949	7,441	
		York	33,203	28,162	4,803	
		Williamsburg	9,069	7,869	1,154	
		Part of Newport News	*22,472	19,929	2,352	
		Total	126,043	92,442	32,913	
5	1	Part of Norfolk	*116,061	84,646	27,807	3
6	1	Part of Norfolk	*116,061	60,236	54,906	
7	1	Part of Norfolk	*75,747	70,136	4,518	1
		Part of Virginia Beach	*40,188	35,931	4,055	
		Total	115,935	106,067	8,573	1
8	1	**Part of Virginia Beach	*116,516	106,126	9,131	1
9	1	**Part of Richmond	*101,411	30,762	70,362	
		Split tracts	10,384	3,852	6,532	
		Total	111,795	34,614	76,894	
10	1	**Part of Richmond	*112,049	87,362	24,104	
		Split tracts	7,207	3,894	3,313	
		Total	119,256	91,256	27,417	
11	1	**Part of Richmond	*18,432	17,952	428	
		Part of Henrico	*39,716	33,664	5,930	
		**Part of Chesterfield	56,849	47,286	7,024	
		Total	114,997	98,902	13,382	

No. of Senators	Location	Total	White	Negro	Other
1	Part of Henrico	*114,608	110,116	4,176	316
1	Portsmouth	110,963	65,992	44,325	646
1	Chesapeake	89,580	68,569	20,682	329
	**Part of Nansemond	5,175	3,838	1,323	14
	**Part of Virginia Beach	*15,383	12,752	2,501	130
	Total	110,138	85,159	24,506	473
1	Amelia	7,592	3,985	3,587	20
	Brunswick	16,172	6,740	9,414	18
	Cumberland	6,179	3,180	2,992	7
	Lunenburg	11,687	6,605	5,068	14
	Mecklenburg	29,426	17,045	12,356	25
	Nottoway	14,260	8,558	5,686	16
	Powhatan	7,696	4,895	2,795	6
	**Part of Chesterfield	20,006	17,024	1,570	26
	Total	113,018	68,032	43,468	132

FOOTNOTES

* Census data on tract and lesser area racial information did not report, because of minor coding errors, the exact location of the following:

Newport News—19 whites and 11 negroes who are in the 2nd or the 3rd Senate districts.

Virginia Beach—19 whites who are in the 7th, 8th or 14th Senate districts.

Henrico—32 whites and 8 others who are in the 11th or 12th Senate districts.

Richmond—37 whites and 25 negroes who are in the 9th, 10th or 11th Senate districts.

Norfolk—37 whites, 44 negroes and 1 other are in the 5th, 6th, or 7th Senate districts.

** In certain instances detailed below the Senate district line splits the smallest census tract, district or block for which data on race is available.

1. In *Virginia Beach*, the district line between the 8th and 14th districts splits census tract 452. The total population of this tract is estimated to be in the 14th district because that portion in the 8th district is an operational rather than residential area of Camp Pendleton.

2. In *Chesterfield*, the district line between the 11th and 17th districts splits census tract 1009.05 which has a population of 3,764, of which 3,702 are white, 57 are negro and 5 are other. The population is estimated to fall 2,378 in the 11th and 1,386 in the 17th. We have no data on the racial split of this tract between the 11th and 17th districts and have, therefore, not included the tract in the racial breakdown so that the sum of white, negro and other in the 11th and 17th districts is 3,764 less than the combined totals for these districts.

3. In *Richmond*, the district line between the 9th and 11th districts splits census tract 1003.03 which has a population of 696 of which 684 are white, 1 is negro and 11 are other. This population is estimated to lie wholly in the 11th district as the map indicates all developed areas are within the 11th district. This population is added into the 11th district totals.

4. In *Richmond*, the district line between the 9th and 10th districts splits a series of census block groups. James Park,

Assistant Director of Planning and Community Development for the City of Richmond, reviewed these specific block groups and estimated the racial breakdown shown on the table. Of the total 17,667 persons in the split blocks, all 7,744 whites and 9,847 negroes have been allocated to either the 9th or the 10th district, but the 76 other persons are not allocated and not reflected in the totals.

5. *Nansemond* is split between the 14th and 15th Senate districts. The racial breakdown for the part of Nansemond in the 14th district is shown on the table. The balance of Nansemond is in the 15th district and equals 29,991 of whom 12,296 are white, 17,637 are negro and 58 are other.

April 15, 1971

The Honorable Henry E. Howell, Jr.
Member, The Senate
808 Maritime Tower
Norfolk, Virginia 23510

Re: Henry E. Howell, Jr., et al.
v.
Joan S. Mahan, et al.
Civil Action No. 105-71-N

Dear Senator Howell:

This office has made inquiry regarding the discrepancies between those population figures which the General Assembly has used for the purposes of reapportionment and which have been stipulated to, and those reapportionment figures submitted to the Department of Justice at their request as supporting data on the reapportionment Acts submitted pursuant to § 5 of the Voting Rights Act of 1965.

I have determined that the inaccuracies in the figures did occur in the second set of population data which was submitted to the Department of Justice. To my knowledge, the correct figures for reapportionment purposes are those which are attached to your Complaint as an exhibit and which we have stipulated to, with one exception. That exception occurs in the Fourteenth and Fifteenth Senatorial Districts. The population for Nansemond County in the Fourteenth Senatorial District should read 6877, rather than 7111, or a difference of 234. This would make the population for the Fourteenth Senatorial District 111,840 and the population for the Fifteenth Senatorial District 121,844.

The reason for this discrepancy is that the Senatorial Reapportionment Bill was amended after the Senate figures were compiled.

I would add that the errors in the figures submitted to the Department of Justice are due to the haste in which they had to be developed which necessitated accomplishing in three days (which included a weekend) a task which should have properly taken well over one week, and was further due to the utilization of a staff made up of individuals from different agencies who could be borrowed at the last minute.

Since the figures forwarded to the Department of Justice have been introduced by yourself as an exhibit in Civil Action No. 105-71-N, I am by carbon copy of this letter requesting the Clerk to file with the other papers in that case, a copy of this explanation.

Very truly yours,

Anthony F. Troy
Assistant Attorney General

AFT:lch

cc: The Honorable W. Farley Powers, Jr., Clerk
United States District Court for the
Eastern District of Virginia
Federal Building
Norfolk, Virginia 23510

Bcc: Mrs. Sally Warthen
Division of Statutory Research & Drafting
The State Capitol
Richmond, Virginia 23219

PLAINTIFFS' EXHIBIT 30

Affidavit

State of Virginia,
City of Norfolk, to-wit:

This day personally appeared before me, Catherine J. Crane, a Notary Public of and for the City aforesaid, whose commission expires on the 11th day of November, 1973, Henry E. Howell, Jr., who after being by me first duly sworn, deposed and said as follows:

That immediately upon passage of Senate Bill No. 125 on June 11, 1971, he obtained from Sally Warthen of the Division of Statutory Research and Drafting of the Commonwealth of Virginia the population figures now contained in Senatorial Districts Fifth and Sixth and she advised as follows:

Senatorial District Fifth	115,711 persons
Senatorial District Sixth	116,466 persons
Senatorial District Seventh	115,959 persons (No change)

An further this deponent saith not.

/s/ Henry E. Howell, Jr.

Given under my hand this 15th day of June, 1971.

/s/ Catherine J. Crane
Notary Public

DEFENDANTS' EXHIBIT 6

Affidavit

I, Conrad F. Taeuber, being duly sworn, hereby depose and say:

I was born in Hosmer, South Dakota, and have acquired the following degrees: A.B., University of Minnesota, 1927; M.A., University of Minnesota, 1929; Ph.D., University of Minnesota, 1931. I was a student at the University of Heidelberg (Germany) 1929-30. From 1935 to 1946, I served with the U.S. Department of Agriculture on agriculture and population problems; from 1946 to April 1951, I was Chief of the Statistics Branch of the Food and Agriculture Organization charged with the world-wide development of agricultural statistics; from April 1951 to May 1968, Assistant Director of the Census Bureau in charge of demographic fields, Associate Director since May 1968. My publications are as follows: Rural Migration in the United States (with C. E. Lively) in 1939; The Changing Population of the United States (with Irene B. Taeuber) in 1958; Contributor to Social Science Journals. I have received the following awards: University of Minnesota's "Outstanding Achievement Award," in 1951; Department of Commerce's "Exceptional Service Award," February 1963; Elected President of the Inter-American Statistical Institute in October 1967.

In accordance with Section 2a, Title 2, United States Code, the President must submit to the Congress in January 1971 a report which shall consist of:

> "(a) . . . . a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of population, and the number of

Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one member."

Although some of the details have varied over the decades, the 1970 enumeration requirements are similar in concept to those requisite in 1790, when the first census was taken. The specific procedures of enumeration have been modernized so as to assure the most complete and correct enumeration possible under the complexities of today's highly developed technological society.

An integral part of the enumeration methods are the procedures used in enumerating the various distinct types of populations to be counted in the census; which types include members of the Armed Forces, college students, staff and inmates of institutions and persons abroad at the time of the census. In all, specific procedures are provided for some 26 different types of situations to make certain that the requirement for counting the "whole number of persons in each State" is properly met.

The phrase, "the whole number of persons in each State" has historically been interpreted by the Bureau of the Census to include those persons whose usual place of residence was a particular State on the date of the census, including those persons present in the State who had no usual place of residence elsewhere.

Questions arise from time to time as to the interpretation of the phrase "whole number of persons"; an example being, whether the apportionment population should include non-citizens. This subject was debated by Congress in connection with the legislation which provided for the 15th Decennial Census (1930) and for the "automatic"

reapportionment of the House of Representatives following each national census. The House Committee on the Judiciary considered in some detail in 1931 the possibility of limiting the apportionment population solely to United States citizens but took no action. Thus, the "whole number of persons" is defined to include citizens and aliens, persons of voting age and those below voting age, persons who are entitled to vote and those who are not yet entitled to vote, as well as those who have lost the right to vote. It is not defined as persons who have established a "legal residence" in a particular State but includes those persons who, whether or not "legal residents" of that State, usually reside therein.

Members of the Armed Forces

In the census, each person enumerated in areas within the jurisdiction of the United States, including members of the Armed Forces, is recorded and counted as of his usual place of residence; i.e., the specific address at which he is living. In the administration of the census, this must be approached in a definitive manner rather than on a presumptive basis, if the census is to avoid missing substantial numbers of persons altogether, on the one hand, or extensive duplication of persons, on the other hand.

The criteria for determining usual place of residence are as follows: persons are enumerated at the place in which they generally eat, sleep, and work, with persons who are temporarily absent for a few days or weeks from such usual place of abode being counted as residents of their usual place of abode.

In the case of the Armed Forces in the United States, members are counted at the specific location where they are living at the time of the census; i.e., where they are actually

residing while in the service. The alternative procedure of counting them at the specific address where they might be presumed to be living if they were not in the Armed Forces presents a number of problems. There are those young men living in their parental home until induction into the Armed Forces and it could be presumed that they will return to their parental home when discharged. There are indications, however, that service in the Armed Forces may lead persons to settle in a different State on discharge. There are, similarly, young men who have left the parental home, who have married and started families. Presumably, they will return to their families, but frequently their service in the Armed Forces means a change of residence for their families, and it is by no means clear that they will return to their previous address. In addition, there are those young men who have left the parental home and who, prior to induction, are living in apartments or rooming houses. To assign them back to these living quarters, now occupied by someone else would raise the disturbing question as to who are the real residents of the living quarters. Finally, persons making a professional career of service in the Armed Forces may not have any real residence other than in the area in which they are serving.

Moreover, the presence of members of the Armed Forces in a particular State, of necessity, increases the financial burden on the local governments in those areas as a result of the increased volume of demand for public services e.g., police and fire protection, water supply, sewage disposal, highways, schools, and other county and municipal services. The aid to education which has been furnished by the Federal Government to impacted areas gives some indication of the magnitude of this problem. In many States, grants-in-aid made by the State governments are made on the basis of total population.

With respect to Armed Forces personnel stationed overseas at the time of the census, the Bureau is allocating such persons back to States constituting their home of record as shown on listings provided by the Department of Defense, which lists were provided for all of the services with the exception of the Navy. The home of record for Navy personnel was obtained from individual questionnaires because the Department of the Navy was unable to provide such information from its records in the form needed by the Bureau. Dependents of such military personnel who are living with them overseas are allocated to the State indicated as their home of record.

The 1970 Census is the first time the Bureau has allocated overseas military personnel back to the States on the basis of the home of record of the individual servicemen for purposes of apportionment; the reason being the unprecedented number (in excess of 1 million) of military personnel and their dependents stationed overseas on the census date.

The greatest problem confronting the Bureau in the allocation of these persons back to the United States was the determination of a basis upon which to do so. Virtually all of the problems which preclude the allocation of domestic servicemen back to their former residence would apply equally to servicemen stationed abroad, e.g., the likelihood that many will not return to the same State, let alone the same address. However, unlike domestic servicemen who, while stationed in a particular State, draw upon its resources, thereby providing a logical basis for allocating them to the State, servicemen abroad impose no burden upon a particular State. Consequently, the only plausible basis which the Bureau could use for such allocation would be the State which the particular serviceman designates as his home of record. Here again, the same rationale which

dictates against allocating domestic servicemen to a specific address within a State, would preclude allocation of overseas servicemen to specific areas within the State. Briefly stated, there is no way of assuring that these persons will return to a specific address, assuming they could report such a specific address in the first instance. An allocation based on such a tenuous assumption would be, at best, extremely inaccurate.

College Students

College students are enumerated where they are living while attending college. If a college student is living in a dormitory, other university housing, or in other housing near the campus, he is enumerated as a resident of that place. Likewise, if he lives in his parental home, or in his own home, and commutes to the college, he is enumerated at such place, i.e., where he actually lives while attending college.

In the 1940 and previous censuses, the procedure was to count the college students as residents of their parental homes even though they lived the better part of the year in the communities where they were attending college. There was evidence that this procedure led, in many cases, to the failure to enumerate the college student at either residence.

In November of 1948, with the number of college students increasing sharply, this problem was reviewed by the Bureau's Technical Advisory Committee on General Population Statistics, a group of independent experts in the fields covered by the 1950 Census. As a result of its study, the Committee concluded that all college students should be classified as residents of the communities in which they were living while attending college. Accordingly, it was recommended that the Bureau adopt such a procedure and the Bureau did adopt the recommended procedures for the 1950

Census. This matter was reviewed again prior to the 1960 and 1970 Censuses and in each instance it was determined that the procedures adopted for the 1950 Census provided the best method of enumerating college students. One of the primary factors considered in the original decision to enumerate college students where they are living while attending school was the evidence that a number of college students may not have been reported either by their families or at colleges. The difficulties involved in obtaining an accurate count of college students are partially explained by the fact that these persons represent a transitional group in our population, for this is the age at which young people tend to leave the parental home. Attendance at college is one of the common steps in that stage of a young person's life. It has been the experience of the Bureau of the Census that the way to make sure that they are counted in the census is to count them where they are living while attending college.

It would be inconsistent to apply to others the criteria for determining usual place of abode, i.e., enumeration of persons in those communities in which they generally eat, sleep and work, and yet make an exception for college students who leave the parental home to spend the greater part of the year in the community where the college is located. In virtually all college towns there is, for the most part, a constant student population for at least nine months of the year, and where summer sessions are held, the population is relatively constant throughout the year. The students live in the community, draw on its resources, rely on its public services and patronize its business establishments. It is the community in which these students actually reside which must plan and develop its public services to provide for all of its residents.

Inmates of Institutions

Persons confined to institutions, whether it be a penitentiary or correctional institution, mental institution, home for the needy or aged, or hospital for the chronically ill, etc., are enumerated as residents of the institution to which they are confined. As with members of the Armed Forces, and college students, it is conceivable that certain inmates of institutions might have a bona fide residence to which they might return upon discharge from the institution. However, a substantial proportion of such persons had no such place of residence prior to entering an institution. This is particularly true of persons committed to the various types of penal institutions, in which the entry on police record may well be "no fixed place of residence." Similarly, in the case of mental patients whose length of institutional stay may be long, the residential and community ties which they may have had before commitment have, in many cases, disappeared by the time they are ready for discharge. Persons under care in homes for the aged have, in a sense, by definition given up any independent residence outside the institution and have no place to which they can return.

The census required that every person be counted at a specific address or residence. This, of course, can be done if such persons are defined as residents of the place in which they are enumerated. To assign them to some other residence where they would presumably be living if they were not in the institution raises a number of problems which can never be satisfactorily solved. Reliance would need to be placed on the report of the inmates or on the institutional records, and this information is all too frequently inadequate to assign them to a specific residence. Moreover, if a specific residence is identified, it may well be occupied by other persons at the time of the census.

Adverse Effects to Defendants from Granting Plaintiffs' Motion

The granting of the relief sought by the Plaintiffs would completely invalidate the results of the 1970 Census and necessitate the taking of a new census for the entire country. A mandate to retake the census would make it impossible to reapportion the United States House of Representatives in time for the 93rd Congress, as required by the Constitution and Section 2a of Title 2, United States Code.

The 1970 Census did not seek information regarding the "legal residence" of college students, military personnel, or inmates of institutions. It might be argued that such information could simply be obtained by reviewing the data gathered in the 1970 Census and identifying persons coming within one of the above categories; once identified, it would be a simple matter to ask these persons their "legal residence." However, this is impossible for two reasons. First, the Census Bureau did not specifically identify all college students and military personnel as being in either of those categories. This results from the fact that many college students and military personnel do not live on campus or on the base and, therefore, were enumerated as any other resident of a private dwelling, without being identified as a college student or member of the Armed Forces. Secondly, many persons who were in the military, away attending college, or were inmates of institutions at the time of the taking of the census have since changed their status and, also, their address. The Bureau would have no way of finding these persons. Thus, the only remaining alternative would be to retake the census of the entire country in order to ascertain those persons falling within such categories.

In order to retake the census, the Bureau would have to seek a new appropriation from Congress in the approximate amount of $200 million (the 1970 Census cost in excess of $200 million). On the presumption that Congress would appropriate the additional funds, the Bureau would have to commence the lengthy process of preparing for the new census, and it would be virtually impossible to begin taking the census before the Spring of 1972. Assuming that the census could be taken by the Spring of 1972, the results could not be processed for presentation to the President prior to December of 1972, which would be too late for the apportionment of the 93rd Congress, the elections for which will be held in November of 1972.

/s/ Conrad F. Taeuber

Subscribed and sworn to before me
this 19th day of October, 1970.
/s/ Helen C. Robbins
Notary Public

EXCERPTS FROM DEPOSITIONS OF APRIL 9, 1971

* * *

[53] LARRY B. Wood, called as a witness, having been first duly sworn, was examined and testified as follows:

Examination by Mr. Howell:

Q Mr. Wood, state your full name, sir. A Larry B. Wood.

Q And how old are you, Mr. Wood? A Twenty-two.

Q And where do you live? A 7416 Patrician Road, Norfolk.

Q Have you heretofore looked at a map of the City of Norfolk and the City of Virginia Beach which I am opening up. Have you looked at this map previously? A Yes, sir.

Q Mr. Wood, have you been able to pick out on the map the approximate location of where you live? A Yes, sir.

Q If you would, sir, take this pen and put a little circle around where you live. A Right. Approximately here.

Q All right, I am going to put a circle around the dot. You understand, Mr. Wood, the dot within the circle is the approximate location of your home? A Yes, sir.

Q Who do you live with at that residence? [54] You may sit down, Mr. Wood. A I live with my parents there.

Q All right. And how many years have you lived at that residence? A Since April of 1968; approximately three years.

Q And how many years have you resided in the City of Norfolk? A Twenty-two years.

Q And how old are you? A Twenty-two.

Q So you were born in Norfolk? A Yes, sir.

Q Now, are you a member of the United States Navy? A Yes, sir.

Q And are you stationed aboard a vessel? A Yes, sir.

Q What vessel are you stationed aboard? A USS John F. Kennedy.

Q Is that an aircraft carrier? A Yes, sir.

Q And how many years have you been a member of the crew of the John F. Kennedy? A Since June, '68.

[55] Q And were you a member of the crew of the John F. Kennedy on April the 1st, 1970? A Yes, sir.

Q Will you tell us that when the John F. Kennedy is in port and you do not have night duty where do you spend the night—your nights? A I spend the night at home.

Q At your home. And at what address is your home? A 7416 Patrician Road.

Mr. Howell: All right. Answer such questions as Mr. Troy may have.

Examination by Mr. Markow:

Q Mr. Wood, on the Kennedy, that is a type of ship that puts out to sea quite often, is it not? A Yes, sir.

Q How long do you stay out when you go? A They make—let's see. A six-months' cruise is the longest cruise we make.

Q Do you make those very frequently? A Once a year.

Q Once a year? A About once every fifteen months.

Q And what do you do during the interim? [56] A After you get back off a cruise we usually have a yard period for major overhaul, and this is the time you train going in and out of port.

Q Are you a registered voter in the City of Norfolk? A Yes, sir.

Q Where was the John F. Kennedy on April 1st? A It was in the Norfolk Naval Shipyard.

Q It was here? A Yes, sir.

Q And you were on it? A Yes, sir.

Mr. Markow: No further questions.

Mr. Troy: This is off the record.
(Discussion off the record.)

Mr. Howell: All right. Larry, you are free to go.

Mr. Tayloe: Wait, let me—

Mr. Howell: Oh, excuse me.

Examination by Mr. Tayloe:

Q Larry, do you have a place to sleep or a bunk aboard ship? A Yes, sir.

Q And when you leave the ship do you have to [57] have the permission of the Commanding Officer or the

officer of the day to leave the ship on a pass? A We just have to have permission from the division officer.

Q And are there not times when this permission is removed whether it be for behavior or because of certain jobs that have to be done? A Only for misconduct would be the only reason.

Q All right. And therefore if the captain says you can't leave the ship you therefore stay?

Mr. Howell: We will stipulate that if the captain says he don't leave the ship he stays on the ship. That is stipulated too.

A Yes, sir.

* * *

Q Larry—Mr. Wood, tell us the regular hours that you are aboard ship and when you leave to go [58] home under ordinary circumstances when the John F. Kennedy is homeported here at Norfolk? A I usually work from eight in the morning till 1630 in the afternoon.

Q Which is what time? A Four-thrity.

Q Four-thirty. All right. And when four-thirty comes what do you do? A We go on liberty.

Q All right. Where do you go? A I go home.

* * *

T. J. REED, called as a witness, having been first duly sworn, was examined and testified as follows:

[101] * * *

By Mr. Troy:

Q All right, Mr. Reed, you testified that on [102] May 11, 1967 you wrote a letter to Doctor Eckler, is that correct? A That is correct.

Q And in that letter you expressed basically what you felt was a discrepancy in the manner of the taking of the census as to navy personnel? A No, not a discrepancy. A need to modify the procedures so as to get better information on navy families residing in the metropolitan area.

Q And you received a response to that letter, not by Doctor Eckler but by Herman P. Miller, Chief of the Population Division of the Bureau of Census? A Yes, this is the normal request directed to the director and a division chief or others will respond.

Q And he indicated to you that the request for the modification that you had expressed would not be feasible, isn't that correct? A Yes, that was his indication.

Q Do you have any idea as to the manner in which your letter was discussed or the deliberations of the Bureau of Census in coming to the conclusion expressed in the letter from Mr. Miller? A You mean what discussion they had in preparing the reply?

[103] Q Yes, sir? A No, sir, I have no indications. I have made similar suggestions in previous situations and had them adopted, so I had no reluctance to make such a request this time.

Q Yes, sir, but— A Both in the line of duty and as a volunteered adviser. In other words I have effected modifications in census procedures over a period of my thirty years of experience with the Census Bureau.

Q Yes, sir. A And there were some modifications suggested here but not a hundred percent.

Q So to answer my question you have no idea as to the deliberations? A That is correct.

Q Now, I am going to hand you an Esso map. I want you to take a look at it and tell me if you can identify it.

Mr. Howell: We object.

A I get them in batches of twenty-five. It is hard—

Mr. Howell: Just a moment. We object to the cross-examination of Professor Reed with respect to the Esso maps because none of it [104] was covered in the direct examination. And further, we deem the Esso map to be entirely irrelevant to the attack on the plan that was adopted.

By Mr. Troy:

Q Can you identify the map? A Well, I am familiar with the Esso map, but—

Q That Esso map has some lines on it though, doesn't it? A Yes.

Q Who drew the lines? A Well, if I drew any of them there have been some others drawn since, and I am not for sure.

Q So you did not draw that map? A This I am not sure. I have drawn a map.

Q Have you drawn a map similar to that? A Yes, but whether it was this one—

Q For what purpose did you draw the map? A For the setting up of senatorial districts.

Q In what City? A Norfolk.

Q At whose request? A Well, I did some in working with Senator [105] Breeden in one instance, and then later with Senator Howell and Senator Babalas subsequently to that.

Q You drew a line similar to those at whose request? Who was that for? A Well, I didn't know that there was a request. It was agreed that there was no suitable or appropriate way of subdividing the City and there were some lines drawn—there were more than one set of lines as a matter of fact, none of them recommended.

Q I am not asking who recommended—

Mr. Howell: Don't interrupt the witness. You have a right to finish, Professor.

A None of them were recommended. If the City was to be divided there was some alternate ways of dividing it to gain the balance of the population that was specified.

By Mr. Troy:

Q All right. I am going to hand you another Esso map. I want you to look at that one.

(Shown to the witness.)

A Yes.

Q Now, this is an Esso map of Norfolk, is it not? A Yes, it is.

[106] Q And it also has some lines drawn on it, does it not? A Yes, sir.

Q These lines basically represent what? A Well, if Senator Andrews were here, you would say the T-bone plan. I suppose that is what you mean.

Q This was a plan that was presented to the General Assembly by the P&E Committee for the dividing of Norfolk? A This I wouldn't know.

Q How do you know Senator Andrews called it the T-bone Plan? A I was present in the Senate Chambers on the day the debate was held and the plan was adopted.

Q What plan? A For senatorial districting.

Q And where did the "T-bone" phrase come from? A He didn't state the source.

Q Who said it? A Senator Andrews on the Senate Floor.

Q When did he say it? A On the Senate Floor.

Q I mean did he say it while he was unfolding [107] that and holding that in his hand? A I don't know that he was holding this in his hand at the time he said that. He referred to a T-bone plan.

* * *

By Mr. Troy:

[108] Q All right. Now, this purports to establish single member districts for the City of Norfolk in some fashion, does it not?

Mr. Howell: Just a moment. Professor Reed said he hadn't had anything to do with this map or these lines and—

Mr. Troy: He hasn't said that yet. Let him answer the question.

* * *

The Witness: What was the question?

Mr. Troy: Mr. Jaime.

(The question was read.)

A Well, it appears to do so, although they are not labelled nor identified as such, and it looks to be some tentative or some alternate or optional lines.

By Mr. Troy:

Q Did you have anything to do with the drawing of those lines? A No, I was with Senator Breeden when he was attempting to divide the Naval Base and he was then

debating on this line. He hasn't finished the line as [109] to where this line—where it goes from there is not indicated. It really hasn't divided. You see? It doesn't go to the City boundary of Norfolk but he was—

Q What was Senator Breeden deliberating when he was trying to cut the Navy Base like that? A He was very much interested in some way of dividing the population there, and I told him—

Q Go ahead. A I told him this was not possible, that the Naval Base as such—the crews of vessels as such were available separately but how you would divide them, there was no provision for that.

Q So that is why you subsequently presented a plan including the naval district in one senatorial district, did you not? A I presented no plan. I drew some alternate boundaries, none of them representing a recommended plan.

Q All right. The alternate boundaries that you drew and I understand you didn't recommend, then you drew them just to be helpful? A It was clear from the public hearing which I also attended that at least some attempt was to be made to divide the City of Norfolk into single member districts. It was not felt that this could be done properly and [110] appropriately to gain legislative representation, but that—

Q Now wait a minute. I don't mind you going on, but now you are volunteering on a basis that you have no authority to volunteer on.

* * *

By Mr. Troy:

Q Professor Reed, all I am trying to get down to is simply—very simply this: That when you drew the lines

to be helpful you included the whole Navy Base, [111] is that correct? A Yes.

* * *

By Mr. Troy:

Q Now, let us go to the sample survey, what you testified to, which reflects the number of sailors in Census Tract 9 and 9.99—or is it .99? A 9.99 only.

Q 9.99 only. We have no problem as to those 13,437 in Census Tract 9 who live in the Fifth Senatorial District, correct? A Yes, sir.

Q All right. So what we are concerned with now is 9.99 only, is that correct, which consists of 36,693. That is what the survey relates to? A That is right.

Q Now, you have testified, and also supplied an affidavit that 59 percent of that 36,693 or approximately 21,600 do not live in the Fifth Senatorial District, is that correct? A That is correct.

[112] Q Where do they live? A In what detail would you like? In Senate District 6? You wish the number by district?

Q Yeah, have you got it? A 5,050 in Senate District 6, 7,100 in the Norfolk portion of District 7 and 9,500 live outside the city limits of Norfolk.

Q They live in Virginia Beach and some live in Chesapeake? A Right.

Q And some live in Portsmouth? A Right.

Q Some live in Newport News? A Right.

Q Some live in Hampton? A I don't know of any living in Hampton.

Q How come you don't know of any living in Hampton. Did you look at this letter from Admiral Cobb? A Yes.

Q How do you come up these statistics on the basis of zip codes? Didn't you check the zip codes? A Yes, I checked yesterday for Norfolk and Portsmouth.

Q Do you know what zip code 23366 is? [113] A Not at the moment.

Q Zip code 23369? A Chesapeake, I believe. I used a postal directory for this.

Q Sir, I am going to hand you a code finder directory listing Virginia localities. I have one here for Norfolk and that breaks down into just the City. I want you to take a look at this and over on the right-hand corner I believe you will see the City of Hampton listed. A Right.

Q Is the City of Hampton broken down—what is the zip code by the City of Hampton in that? A 23369.

Q All right. Now I am going to hand you a zip code directory from Norfolk, Virginia, and I want you to open that and Norfolk is the first. The first three numbers are 235 in the zip code? A Right.

Q And the last two digits indicate location? A Within the City.

Q All right. Now, what is 23501? A That is the boxes under 3,000.

Q All right. And where— A At the main office.

Q Where did you include those people? [114] A District 5.

Q I am just going to lay out here—this is the present senatorial districts as adopted and I am just going to lay

this out for helpfulness. I want you to take a look on t
first page of this document. I have handed you zip co
23503. In your sample that consists of 74 people reportin
at zip code 23503— A Where are you getting that?

Q 23503. A Whereabouts are you finding that?

Q On the sample here. A Oh. Okay, okay.

Q And there were 74 people reporting there? A A
right.

Q All right. Now, 23503 is listed as Ocean View Sta
tion PO Boxes. Is that not correct? The first column just
little way down there? A Well, you have some there bu
you have others.

Q Wait a minute. A You have other listings.

Q I will get to those.

Mr. Howell: Just a minute, don't interrupt.

Mr. Troy: Senator, I have a question [115] put to him

Mr. Howell: Just a moment. He has a right to explai
his answer. A It includes both boxes, yes.

By Mr. Troy:

Q All right. Now, if you will— A Not limited t
that. Not limited to that if I might add.

Q No, it is not. That is what I am going to get to righ
now, Professor.

* * *

By Mr. Troy:

Q All right. Now, if you turn to the next to-the-la
page on this, Ocean View Avenue is also 23503, is it not
A Parts of it.

[116] Q Numbers 100 through 2099? A Right.

Q Did you make a comparison to find out where those numbers were with relation to Senatorial Districts 5, 6 and 7? A Yes.

Q Which districts are they in? A Three. All three.

Q All three? A Yes, sir.

Q All right. How did you break up the 74? A 35 in District 5, 12 in District 6 and 27 in District 7.

Q Now, what basis or authority—how did you come to those figures? A By an approximate adjustment figure allocation.

Q Okay. And of course this was all on the sample that was provided? A That's right.

Q Can you add up the sample? It adds up to 544, does it not?

Mr. Howell: Instead of 543?

Mr. Troy: Yeah.

[117] Mr. Howell: We don't know, but we will accept it.

Mr. Troy: It seems unusual to me that the Professor has gone through all this and hasn't even come up with the correct totals.

Mr. Howell: Well, I told him to accept the accuracy of the Commandment of the Fifth Naval District.

Mr. Troy: Will you stipulate that?

Mr. Howell: Yes.

Mr. Troy: It is already on the record.

Mr. Howell: Yes. I stipulate that I told Professor Reed to accept the sample.

By Mr. Troy:

Q As a census sample? A No.

Q By its very definition it is not? A It is a 100 per cent sample, if you wish.

Mr. Howell: We will stipulate that.

Mr. Troy: I am almost through, Senator.

Mr. Howell: Good.

Mr. Troy: We are getting along very fine much better than I anticipated, so—

[118] By Mr. Troy:

Q That zip code 23503 which was in an example, you broke that up on an adjustment basis? A Yes, into three different districts.

Q You had to do that in a number of other districts in here? A Right.

* * *

EXCERPTS FROM DEPOSITION OF APRIL 20, 1971

* * *

[5] CONRAD F. TAEUBER, a witness, was called for examination by counsel for the City of Norfolk, and, after having been first duly sworn by the Notary Public, was examined and testified as follows:

By Mr. Tayloe:

Q State your name, please, sir. A My name is Conrad Taeuber.

Q Would you state your address, Dr. Taeuber? A The address is Bureau of the Census, Washington, D.C.

Q Would you state what your position with the Bureau of the Census is? A I am Associate Director in Charge of Demographic Fields.

Q Would you briefly describe what this encompasses? A This encompasses responsibility for the work relating to the 1970 Census on population and housing, the 1970 Census of agriculture, and the programs of current surveys which the Bureau carries on, which relate to information about people, households and housing.

[6] Q What is your relationship to the Director of the Bureau of the Census? A I report directly to the Director. There are a number of Associate Directors of which I am one.

[7] * * *

Mr. Howell: I think you want to put all these in, but we recognize Dr. Taeuber is one of the Nation's outstanding demographers and experts in the field of enumeration and statistical matters relating to the United States Census.

[8] * * *

Q Drawing your attention to the 1970 Census and specifically where was the military man attached to a naval base vessel home ported in the United States counted for population purposes? A A military man stationed on a vessel home ported in the United States was counted as a part of the population of the home port to which that vessel was assigned.

Q Was there any change from tradition as to the counting of a person who was attached to a naval vessel? A Between 1960 and 1970 there was such a change in that in 1970 the person was counted at the home port to which the vessel was assigned.

In the 1960 Census and in previous censuses the practice had been to ascertain where the ship was present at 12:01 a.m. of Census Day and to count the ship's personnel as located at that place.

Q Was there any change as to where a person attached to the vessel itself was counted as to his residency? A No. The practice in both 1960 and 1970 as had been previous to 1960 was to count such personnel as on [9] the ship to which they were assigned.

* * *

By Mr. Tayloe:

Q The decision which is the means of counting population aboard a naval vessel, was there considered other alternatives as to how these men would be counted? A Yes.

This is part of the whole process which goes on at the Bureau of the Census; after each census we conduct studies of the completeness of count, of the accuracy of the information which we collected. We review [10] our practices in some detail and we do consult with advisors. We have advisory committees with whom we work quite regularly.

We solicit advice from many other people and throughout the decade we carry on studies, discussions, considerations of ways of improving the census operations.

One situation that came to our attention during these reviews was particularly with reference to the men aboard ship and the fact that a ship, and a fairly large ship, may actually be away from its home port for operational reasons or for any one of a dozen different reasons at the time of census, and that the practice that was followed in 1960 appeared to create some inequities because of the situation which arose when a ship which was normally located at one port happened to be away from that port on census day and therefore was counted at the other place.

It was felt after reviewing this and related situation it was felt that we could improve somewhat the accuracy of our count and also to avoid problems arising because of possible uncertainty of where people should be counted by going to this rule that the home port would determine where we count the personnel on a ship, [11] recognizing that the ship might at that moment, that is midnight, April 1, might at that moment be somewhere else.

Q Would you explain for the Court the rationale behind the census decision of placing these persons attached to a naval vessel aboard the vessel itself as a resident of that vessel? A This is consistent with the procedure that we follow in relation to people in the armed forces generally. We count members of the army at the place where they are stationed as we do members of the other branches of the armed service.

It is consistent also with the practice which we followed in relation to those persons who may work in one location, live there during the work week, and then go somewhere else, where they are maintaining a family for the weekend or for the balance of the week.

It has seemed to us that it is necessary in cases like that to avoid double counting, to avoid under counting, to adopt certain rules, and the rule that has worked best is the rule as I have stated it.

In relation to these men aboard ship, this is where they work, this is where they live during a considerable period of time, during a majority of their [12] time, and even when they are in port I understand they can leave the ship only at the—

Mr. Howell: Object.

The Witness: They can leave the ship only at the pleasure of the commander.

Mr. Howell: We note an objection to Dr. Taeuber testifying concerning an understanding.

By Mr. Tayloe:

Q I would like to now draw your attention to persons attached to military bases other than naval vessels, how they are counted for the purpose of population? A Let me distinguish between the people who are living in the United States, who are in the United States, and people who are outside.

If they are in the United States, they are counted at the military base where they are stationed. For persons outside the United States attached to the military, they are not counted as residents of any place.

There was a procedure for assigning them for the purpose of apportionment of the United States Congress, assigning them back to the home state. But there was no procedure for assigning them back to any locality within the state.

[13] Q Would you describe the rules that the U.S. Census Bureau used in the 1970 Census concerning institutions. public institutions, such as penitentiaries, local jails, hospitals, and college students? A College students are counted as residents of the place where they live while attending college. If they are living in a dormitory or campus housing, they are counted there.

Inmates of prisons and hospitals for the mentally deranged, mentally defective, are counted as of the place where this institution is located.

Q Penitentiaries? A Penitentiaries, yes, inmates of penitentiaries would be counted where the penitentiary is.

Q Local jails? A Local jails the rule is the same.

Q And again is this based upon a particular criterion established by the U.S. Bureau of Census? A Yes. This is based on the rules developed by the Bureau of Census in the light of long experience and careful studies of methods that would most effectively avoid undercounting and avoid double counting.

Q I show you a document entitled Affidavit [14] prepared in the case of The Borough of Bethel Park, et al. vs. Maurice Stans, in the United States District Court for the Western District of Pennsylvania, and I ask you if you can identify the document that I have just drawn to your attention? A Yes, I do.

Q There appears to be a signature at the end of the document with your name, is that your signature? A copy of your signature? A Yes, on this one it is a copy of my signature.

Q Could you tell what that document is, Doctor, for the record? A This document is an Affidavit which was prepared for submission in a suit identified as you did, which is labeled as Civil Action 70-1049.

Q And was this document prepared by you? A Yes, it was.

Q And would you tell the general substance of the document? A The general substance of the document has to do with the census procedure for determining how to count the whole number of persons which is the number that is [15] required particularly for apportionment for the federal Congress.

The suit was brought to raise questions concerning the allocation of members of the armed forces, the allocation of inmates of institutions, and the allocation of college

students under the specific rules of residence which the Census Bureau follows.

* * *

By Mr. Tayloe:

Q Could you give some idea for the Court the manner in which the decisions involving population counting [16] of military personnel and the institutions which you have discussed, how these decisions were made?

Mr. DuVall: Same objection. Really continuing objection. These will be shown by legal records and precedents and he is simply stating his opinion of what the decisions say.

By Mr. Tayloe:

Q That was not the question, but go ahead and answer the question. A Well, the objective in a census is to get a count, and a complete count, of persons at the place at which they usually live.

This is not necessarily the place of legal residence, but is as I stated, the usual residence of this individual.

In doing this, it is necessary to take account of the facts for some persons in our population there may be a question—

* * *

The Witness: And it has been necessary to develop certain rules which our enumerators can follow, certain rules which can be given to the population which [17] is asked to fill out the questionnaires.

And over the years we have developed these rules along the lines indicated previously. We do as part of every census carry on investigations to see how effectively these rules have been carried out to identify population groups for which it may be necessary to develop some modification

of the rules in order to meet this objective, counting every person, not missing anybody, and not counting anybody twice.

And as I stated previously, one such case did come to our attention in the review following the 1960 Census and that had to do with the question of these naval vessels.

* * *

By Mr. Troy:

Q It came to your attention with reference to the naval vessels. I take it this was with reference to the 1960 decennial census count? A Yes.

This did come up with the review of the 1960 count.

Q Did this review encompass, or could you give us [18] an idea of the man hours encompassed in the reviews, whether there were meetings, who were brought in on the meetings, and just an idea of the type of deliberation that went on? A Well, it's hard to break this out because this was part of a more general review.

I would say there were many meetings of our own staff, that is the persons on our own staff that were directly concerned, which includes Dr. Sheldon particularly and his colleagues.

It would include also some members of our field staff, the people who direct the actual collection of the data.

It would include also representatives of our geographic division which has the responsibility for giving us the maps and the boundaries, and setting out the boundaries of cities, municipalities, counties, census tracts, city blocks.

And this is a matter that would in the normal course of events as it was to be brought to the attention of the advisory committees with whom we meet from time to time to review all matters of census procedure and census concepts.

These advisory committees, the particular [19] advisory

committee involved in this type of issue is one we call population advisory committee, consists of experts in the demographic field from all parts of the country who we designate as members of this committee and who we bring in to meet with us from time to time.

Q On the basis of their deliberations and recommendations, the decision was made on how to enumerate navy personnel assigned to vessels? A My recollection is that it was just the other way around, that we brought a recommendation into them and they agreed that under the circumstances this was the most reasonable procedure.

Q You reported to the Commonwealth of Virginia two different total counts for the state. One was a count of some 4,690,000 individuals and the other was a count of 4,648,000 individuals.

I think you have already explained—that's a difference of some 42,000. I think you have explained that these individuals are the ones that were counted overseas and assigned only to the Commonwealth? A I don't recognize either of those numbers. I could verify it, and Dr. Sheldon, we could verify it. That is the difference between the resident population and [20] the apportionment populations.

Q I think we can stipulate for the record the numbers. My question is going to relate as to why did you give us two counts, and not so much as to the actuality of the exact figure, Doctor? A Well, that question is easily answered. The intent here is to recognize that for most purposes the population concept to be used is that of the resident population, that is the total number of persons living in the state, in this case the State of Virginia.

For purposes of Congressional apportionment we reported also the number of persons, members of the armed

forces, civilian employees of the federal government, and their dependents living with them overseas who were assigned to a home state, and this number was used in computing the number of representatives to which each state is entitled.

Q Was this done for every state? A This was done for every state.

Q And basically was the number used for Congressional reapportionment larger than the other number? A In all cases the number used for Congressional [21] reapportionment was larger than the resident population, and the difference was this group of persons who were living abroad at the time of the census.

Q The smaller number is used for local reapportionment and not congressional? A The smaller number is the number which we define as the resident population of the state, and it is used for many purposes.

[34] * * *

Cross Examination

By Mr. Howell:

Q Dr. Taeuber, are you acquainted with Dr. T. J. Reed of Old Dominion University? A Yes, I am.

Q How long have you known Professor Reed or T. J. Reed? A It's more than 20 years. I don't know exactly how many more.

Q And are you acquainted with his experience and qualifications to work with and correctly interpret United States Census Data? A Yes.

We regard him as very well equipped to work with such data.

Q And are you familiar and did you play a part in recommending that Professor Reed be appointed by the Secretary of the Commerce as a member of the census unit of the National Defense Executive Reserves? A Yes, I am.

[35] Q Would you state the purpose and function of the census unit of the National Defense Executive Reserves? A That reserve was appointed a number of years ago as part of an effort to be prepared for any crises, any catastrophe that might happen which would put the Bureau of the Census at its present location out of commission and persons were selected to serve in case of emergency to be able to bring together what might remain of the Bureau staff and records and to carry on the work which might be assigned to the Bureau under the circumstances.

Q Nationwide would the number that were appointed at any one time be in the neighborhood of 13? A It would be in that neighborhood, yes.

[38] * * *

Q Dr. Taeuber, I am interested in your opinion as to whether or not the primary purpose was for the apportionment of the Congress of the United States, and if not, feel free to elaborate on what you deem to be the primary purpose starting in its original concept for enumerating people in the United States of America? A Well, my opinion is that the 1790 Census was done primarily for the purposes of apportionment of the Congress.

Q The Congress? A Right.

[39] Q And I don't know whether you have a copy of your Affidavit. I have just gleaned it, of course, because it was just furnished to me during the course of this deposition, but I am on page 2, and I was very much interested

in the fact that you state in your Affidavit that although some of the details have varied the 1970 enumeration requirements are similar in concept to those requisite in 1790.

I would like to ask you just what you mean by that statement? A The purpose in 1790 as in 1970 is to establish the whole number of persons in each state and beyond that the whole number of persons in each area within the state.

Q Now, the whole number of persons within each area of the state, was that a primary purpose in the original concepts of the enumeration that was directed to be taken in 1790? A In 1790 the primary requirement as I understand it was the whole number of persons in each state.

Q And although in your affidavit you say that the concept has remained the same, do you wish to change that statement to say that you now have a primary purpose of determining the whole number of persons within certain [40] areas of the state or is it still primarily just for the purpose of reapportionment, determining the whole number of persons in the state? A My interpretation of that particular sentence is a little different from the one you are reading. I think the point we were trying to make here is that the concern is still with the persons living in a state rather than persons that may claim that state as their state of legal residence or voting entitlement or the state in which they pay taxes or any other bases.

The concept still is where does this person live or reside without getting into the question of legal residence.

To that extent the concept has remained the same.

Q Am I correct in stating that it is the assumption, or it was the assumption of the Bureau of the Census within the Department of Commerce when they took the 1970 Census that navy personnel not only work aboard the ves-

sels to which they were assigned, but lived on the vessels
A They lived on the vessels in the sense in which we u
the term, yes.

[41] Q If in the enumeration of airline pilots fo
say United Airlines the pilot maintained a home in Arling
ton, Virginia, with his family, and assume he had thre
children, and he had a route which required him to sleep i
five different motels as he carried out his particular assign-
ment for United, lived in five different motels located in five
different states on Monday through Friday but came home
and spent every Saturday and Sunday night in his $32,500
home in Arlington with his wife and three children, when
the census was taken either by mail form or any followup
by an actual personal interview, where under the 1970
Census criteria would that United pilot have been enum-
erated?

Mr. Tayloe: For the record the City objects on the
grounds that there is no evidence by the stretch of imagina-
tion which would hitch the factual situation with the hypo-
thetical given by Mr. Howell.

The Witness: Given all the circumstances as described,
he would have been asked at the motel or hotel at which he
was staying whether he had a place where he usually lived,
since he does not come under the category of a person who
lives and works in one place and perhaps spends his free
time somewhere else.

[42] This individual as described would have been the
temporary resident of a hotel or motel and these people
were asked to report themselves as of the place where they
usually lived.

Q So that in the case of the hypothetical United Air-
lines pilot he would have been enumerated in Arlington that

is the place where he lived with his wife and three children? A Given all the circumstances as described this would be consistent with the rules, yes.

Q Now, if we had a navy salvage tug home ported at Norfolk, Virginia, which 95 per cent of the year completed its tug duties and returned to the dock in Census Tract 9.99 it being known as the Naval Operations Branch within the language of the Census Bureau, and that tug boat crew—well, let's just take the tug boat captain for simplification purposes, was married and lived with his wife in an apartment that he rented in a particular area of Norfolk.

Would he be assigned to Census Tract 9.99 which would be the Naval Operations Branch or would he be enumerated with his wife and any other dependents that he had at his apartment on Little Creek Road which happens [43] to be just an average person's avenue in the City of Norfolk? A I'd like to consult Dr. Sheldon on that one. It's a very unusual case.

My interpretation would be that he would come under the general rules of being counted on the vessel which was home ported in Norfolk.

Q Now, is it not true that the primary reason for not counting that type of naval personnel who has a home and a wife and dependents within the Norfolk area the primary purpose for not counting that type of person where he usually sleeps rather than aboard his vessel was for enumeration conveniences of the Bureau of the Census? A There is a general situation in that there are a number of persons, you have drawn attention to one group, there are a number of other categories which might be described in which there could be some disagreement as to the proper place in which these people should be counted.

And the Bureau of the Census has found it necessary and useful to develop rules which will meet the major objectives for the majority of the groups, or for the [44] majority of the people in a group.

In any determination of this type, I suppose there are supposed to be some exceptional situations. But in a massive operation like the census, we are counting more than 200 million people, it is necessary to establish certain rules which can be interpreted and easily followed by the enumerators, by the individuals who may be concerned.

Q To your knowledge, in the taking of the 1970 Census, were any specific standards or criteria established for the sole purpose of the redistricting and reapportionment of any state legislative bodies? A No.

The answer would have to be no.

Q Dr. Taeuber, so long as the inhabitants worked and lived in the same state, the question of whether they be enumerated where they worked or where they lived would do no violence to the primary purpose of the Bureau of the Census to determine the whole number of persons within the state for the purpose of congressional reapportionment, is that correct? A For purposes of congressional reapportionment the only number that is required is the total population of [45] the state, that is correct.

Mr. Troy: Senator I would like to also object that again your question is misleading and seems to indicate that this is the only purpose of enumeration which I don't think the witness has testified to.

By Mr. Howell:

Q Dr. Taeuber, are you familiar with the allocation of mailing areas by zip codes that exists within the United States?

I am not talking about specific zip codes but the general plan. A I am familiar with the system, yes.

Q Do you feel that if one knew the number or if one had an accurate sample of a group of people allocated by zip code mailing addresses that a demographer or a person with statistical experience such as specifically the experience that you know that Professor T. J. Reed has, could make a fairly accurate allocation of general residences by analyzing the zip codes with reference to census tracts and specific locations within any particular city? A It might be possible to make a usable approximation. The zip codes don't necessarily correspond [46] to city boundaries, to census tract boundaries, to any other boundaries recognized for other purposes.

But by comparing the areas which are covered one could make a reasonable approximation to the numbers of persons involved, yes.

Q I don't suppose, Dr. Taeuber, that you are familiar with the three lines that have been drawn to set out three senatorial districts in the Norfolk-Virginia Beach area, you are not at all familiar with those? A No, I am not at all familiar with that.

Q I just have one or two more questions.

Mr. Troy: Excuse me, sir. I'd like to make an objection for the record that the response of Dr. Taeuber with reference to the ability to make a sample on zip codes in no way reflects the credibilitty of the sample made by Professor Reed.

I think that credibility would speak for itself. Professor Reed didn't even know all of the zip codes in making his determination.

Mr. Howell: Off the record.
(Discussion off the record.)

By Mr. Howell:

Q Dr. Taeuber, if you received information [47] regarding census tract 9.99 in Norfolk, Virginia, that being the census tract that is designated as naval operations branch which had the piers to which were assigned a fairly significant number of vessels home ported at Norfolk, and if you determined from the census information which had been furnished by you to me which indicated that 36,693 individuals were enumerated as constituting crews of naval vessels home ported at Norfolk, and if you were further reliably advised and found it to be accurate, and that 21,600 of these persons enumerated aboard these vessels maintained local residences within the general region with their wives and other dependents, and if you found that an economical method could be devised for the naval personnel who have been assigned the responsibility of enumerating navy people on behalf of the Census Bureau, that they could use it with facility and without a great deal of expense, would you as a leading administrator in the Bureau of the Census desire to have information as to the number of persons aboard vessels home ported in Norfolk who actually when their ships were in live with their wives and children, if they had children, at different locations in the general area? [48] A I think if I had such information I would want to study the matter very carefully to see whether actually this kind, the kind of use which you suggested, could be made of it, and to see what the implications of it would be.

Q Now, in your affidavit which was introduced by Mr. Tayloe and which was relied upon by District Judge Gurley in the Bethel Park against Maurice Stans case you have pointed out many valid reasons why military persons

stationed within a state should be enumerated as constituting the whole number of persons within that state.

On page 4 of your affidavit you point out the need for police and fire protection, sewerage disposal, highways and schools, and other county municipal services and an effective method of mass transportation for the sailor who didn't have an automobile.

And you refer in here to the very important allocation, namely federal impact funds for schools. These services that are desired and that are necessary to properly—that should be properly furnished to members of the armed forces are area wide services that will be used in the area at large rather than at any one [49] particular census tract.

Is that a correct conclusion regarding the services that you have enumerated on page 4 of your affidavit? A Yes, that is essentially correct.

Mr. Howell: That's all the questions we have.

Cross Examination

* * *

By Mr. Troy:

Q As you indicated, Professor Reed is a member of the census unit National Defense Executive Reserve. In that capacity, are such members involved in the decision making process of the Bureau with regard to methods of enumeration? A In that capacity they are not. They are experts in the field. They are as free as anyone else is to make suggestions but the purpose for the reserve was not to consult on specific methods relating to the census.

* * *

[50] Q Now, going to more or less concepts of enumeration, does the legal concept of residence or domicile play a role in the enumeration of the population? A No.

Q So what concept is it, where the person lives rather than where he thinks he lives? A The concept is essentially one of usual resident, where does the person actually live.

Q Does this concept apply not only to a state as a whole, but to areas in each state? A Yes.

Q Now, you do enumerate for purposes other than mere congressional reapportionment, and I say that for example based on the evidence that you supply most states two figures? A The census data are used for many other purposes including in many states for districting, apportionment and districting for the state legislative [51] bodies.

Q Now, you have mentioned to Senator Howell that there was disagreement, or there could be possible disagreement, in may areas when you get down to certain situations and certain groups of individuals as to where they do live.

What certain types of groups are encompassed in the concept that you could disagree as to where they live? A I think one of the major groups involved would be the migratory workers, migratory-agricultural workers who move about from place to place.

There are certain other kinds of seasonal workers for whom there could be a question, about whom there might be some dispute.

Q What other groups? A Well, there are other groups of workers, construction workers for instance, who might be required by the nature of their jobs to be somewhere other than the places where their families are living.

And then there are people who maintain two homes. People who may have a home in the city or a home some-

where in the country. And they pay taxes in both [52] places. They vote at only one. And there might be a question should they be counted in the one place or should they be counted in the other place?

Q College students? A There could be a question about college students, yes.

Q Inmates of institutions? A There have been questions raised about inmates of institutions particularly inmates of certain kinds of hospitals.

Q And as we know, military men? A Yes.

Q Now, what the Census Bureau has done is make decisions with reference to all these possible areas of disagreement and decisions have been made on the concept that the Census Bureau uses, and that is where a person mainly lives, rather than where his legal residence or domicile is? A We are concerned primarily with where he usually lives. In most cases this is also his legal domicile, but in cases of question we would be concerned with where he usually lives rather than asking specifically about legal domicile or voting residence.

[53] Q And your deliberations covered the areas—the group areas of disagreement which we have just enumerated? A Yes.

Mr. Troy: I have nothing further.

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PETITION FOR LEAVE TO INTERVENE

1. Petitioners William S. Thornton, Philmore Howlette, John M. Brooks, E. L. Slade, and Arthur Brown, seek to intervene to set forth the claims alleged in the attached Complaint in Intervention, and to preserve their rights as members of the plaintiff class presently represented by the named plaintiffs DuVal, et al.

2. The instant litigation, involving the apportionment and districting of the House of Delegates of the Virginia General Assembly, may or will have a conclusive and binding effect on the petitioners' rights under the first and fourteenth amendment to the Constitution of the United States. Moreover, each of the petitioners is black, and therefore asserts rights under the fifteenth amendment and under various statutes including the Voting Rights Act of 1965, 42 U.S.C. § 1973, which may or will also be conclusively or bindingly affected by the judgment in this case.

3. One of the questions raised in this case concerns the action of the Attorney General of the United States in reviewing the apportionment plan pursuant to 42 U.S.C. § 1973c. Petitioners Thornton and Howlette actively participated in the proceedings leading to the action of the Attorney General of the United States, and the petitioners here represent the class of black voters who are the intended beneficiaries of the Voting Rights Act's protections.

4. The named plaintiffs, DuVal, et al., may not or cannot represent petitioners' interests adequately.

5. Petitioners have not sought to intervene before because, until the General Assembly recessed on May 11, 1971 (contrary to the Governor's recommendation), petitioners could reasonably believe, and did so believe, that the General Assembly would comply with 42 U.S.C. § 1973c, rather

than attempt to enforce a law to which the Attorney General had interposed an objection.

Wherefore, petitioners pray that this Court, pursuant to Rule 23(d) and Rule 24(a) and (c), Fed. R. Civ. P., grant leave to intervene, to file the attached Complaint in Intervention, and to participate in the case with full rights as plaintiffs.

Petitioners further pray that the pre-Trial Order of this Court, entered March 17, 1971, be amended to allow them to file stipulations, exhibits, and other documentary evidence, limited to the issues raised in their Complaint in Intervention, as well as a list of possible witnesses (to be called only in the event that defendants refuse to stipulate), on or before Friday, May 21, 1971, and to allow them to file a short legal memorandum in support of their proposed findings of fact and conclusions of law on or before Thursday, May 20, 1971.

* * *

Statement Pursuant To Local Rule 13

In compliance with Rule 13, Rules of the United States District Court for the Eastern District of Virginia, petitioners state that they rely upon the following authority in support of the foregoing petition:

Mann v. *Davis,* 245 F. Supp. 241 (E.D. Va. 1965) (Order allowing petitioners Thornton, Slade, Brooks and others to intervene).

Notice

To All Counsel:

Please take notice that the foregoing Petition for Leave to Intervene will be brought on before the Honorable Robert R. Merhige, Jr., at the United States District Court for the

Eastern District of Virginia, on May 24, 1971, at 10:00 A.M., or as soon thereafter as the Court may allow.

* * *

COMPLAINT IN INTERVENTION

1. In accordance with Rules 23(d) and 24(a) and (c), Fed. R. Civ. P., William S. Thornton, Philmore Howlette, John M. Brooks, E. L. Slade, and Arthur Brown [hereinafter called "plaintiff-intervenors"] hereby intervene to allege that the defendants' plan for apportioning the Virginia House of Delegates violates plaintiff-intervenors' rights under the first, fourteenth and fifteenth amendments to the Constitution of the United States, and under federal statutes including section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

2. Plaintiff-intervenors are all citizens of the United States and residents and qualified electors of the Commonwealth of Virginia and the City of Richmond. Each is a black person.

3. Each plaintiff-intervenor sues on his own behalf and on behalf of all those similarly situated, including particularly all black citizens of the Cities of Richmond, Norfolk, Portsmouth, Newport News, and Hampton. This is a proper class action under Rule 23(b)(2), Fed. R. Civ. P.

First Count

4. Plaintiff-intervenors adopt paragraph 1-8 of plaintiffs' complaint.

5. On March 1, 1971, defendant Holton signed House Bill 63, containing an amendment to Virginia Code § 24.1-12.1 in the form of a new apportionment plan for the House of Delegates of the Virginia General Assembly. A

copy of House Bill 63 is attached as Exhibit C to the plaintiffs' Complaint.

6. Five large independent cities in the Commonwealth of Virginia have substantial concentrations of black people: Richmond, Norfolk, Portsmouth, Newport News, and Hampton. Under the apportionment formula of House Bill 63, each of these cities constitutes a single district represented by a number of Delegates elected at-large (with three of the cities also sharing additional floater Delegates with neighboring territory).

7. The following table shows the districts assigned each city, the population by race of each city, and (where applicable) the population by race of the entire floater district:

City (District)	White Pop. (and %)	Black Pop. (and %)	Total (Incl. "Other")
Richmond			
33d—5 seats	143,857(57.63%)	104,766(41.97%)	249,62
35th—1 seat with Henrico Co.	287,669(71.21%)	114,772(28.41%)	402,98
Norfolk			
39th—7 seats	215,055(69.83%)	87,275(28.34%)	307,95
Portsmouth			
41st—2 seats	65,992(59.47%)	44,325(39.95%)	110,98
42d—1 seat with Va. Beach & Chesapeake	289,389(77.66%)	80,695(21.65%)	372,68
Newport News			
49th—3 seats	97,887(70.84%)	39,208(28.38%)	138,17
Hampton			
50th—2 seats	89,376(74.00%)	30,619(25.35%)	120,77
52d—1 seat with James City Co., York Co. & Williamsburg	136,854(75.65%)	42,885(23.71%)	180,90

8. In each of these cities, black people constitute a cognizable minority who generally share political, economic and social interests on many questions which diverge significantly from the interests of the white population.

9. The above-described minorities are large enough and concentrated enough to have a significant or decisive ability to elect or participate in the election of a candidate or candidates of their choice, if the districts are fairly drawn.

10. The creation of large multi-member districts in these cities, however, with representatives elected at-large, operates to minimize and cancel out the voting strength of the above-described racial and political element of the voting population.

11. The floterial districts for Richmond and Portsmouth (Districts 35 and 42) further dilute the black voting strength by combining those cities with neighboring areas whose percentage of black population is considerably smaller.

12. *Violation of Law.* For the reasons stated above, the districts assigned to the five named cities, namely Districts 33, 35, 39, 41, 42, 49, 50 and 52, violate the plaintiffs' first amendment rights to free speech, association, and petition, and their fourteenth amendment rights to equal protection, and their fifteenth amendment rights to vote without abridgement or denial on account of race.

Second Count

13. Plaintiff-intervenors reallege paragraphs 1-11 of this Complaint in Intervention.

14. House Bill 63 constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect

on November 1, 1964," and therefore may not be enforced unless the requirements of section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, are met.

15. 42 U.S.C. § 1973c provides as follows:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State of subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of

three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

16. On March 1, 1971, defendant Holton transmitted House Bill 63 to the Attorney General of the United States with a request for a decision pursuant to 42 U.S.C. § 1973c.

17. On March 16, 1971, the Attorney General of the United States transmitted a letter to defendant Holton, saying the material submitted on March 1 had provided insufficient information upon which to proceed with the statutory determination, and requesting additional essential material. The letter also said the 60-day period provided under 42 U.S.C. § 1973c would not begin to run until submission of the additional essential material.

18. Thereafter, defendant Holton provided some or all of the additional material requested in the letter of March 16.

19. On March 4, March 16, and April 23, 1971, plaintiffs Thornton and Howlette, and their counsel, transmitted letters to the Attorney General of the United States, arguing that the use of multi-member and floterial House of Delegates districts in large cities with substantial concentrations of black population diluted the votes of black residents of those cities, and concluding that the Attorney General should therefore interpose an objection to House Bill 63.

20. On May 7, 1971, the Attorney General of the United States transmitted a letter to defendant Holton interposing an objection, pursuant to 42 U.S.C. § 1973c, to the House of Delegates multi-member districts in Hampton, Newport News, Norfolk, Portsmouth and Richmond.

21. Despite the aforesaid letter, the defendants have announced that they intend to enforce the provisions of House

Bill 63, and that the primary elections for nominations to the House of Delegates seats created by House Bill 63 will go forward on June 8, 1971.

22. *Violation of Law.* The defendants' threatened enforcement of House Bill 63, without complying with the requirements of 42 U.S.C. § 1973c for establishing that it is not racially discriminatory violates the rights of the plaintiff-intervenor class under 42 U.S.C. § 1973c and under the fifteenth amendment to the Constitution of the United States.

Equity

23. Plaintiffs have no adequate remedy at law. Unless this Court grants an injunction, the plaintiffs will suffer irreparable injury to their precious rights under the first, fourteenth and fifteenth amendments to the Constitution of the United States.

Relief

24. Wherefore, plaintiff-intervenors pray that this Court grant relief as follows:

(a) Declare that House Bill 63 violates the first, fourteenth and fifteenth amendments to the Constitution of the United States, and 42 U.S.C. § 1973c;

(b) Enjoin the defendants from taking any steps with respect to electing Delegates pursuant to House Bill 63, including without limitation furnishing forms of nomination; receiving the names of candidates, notices of candidacy or petitions therefor; and conducting or allowing the holding of the Primary Election scheduled for June 8, 1971, or the General Election scheduled for November 2, 1971;

(c) Order the defendants to take all necessary steps to reapportion the House of Delegates in accordance with the Constitution and laws of the United States, such steps to

include without limitation adopting single-member districts for the five cities listed herein, obtaining proper clearance under 42 U.S.C. § 1973c, and submitting the new plan to a further hearing of this Court;

(d) As an alternative to (c), Order all parties to this suit to file apportionment plans within thirty days, following which the Court will adopt a plan and take all steps necessary to insure that such plan may be enforced by the defendants;

(e) For purposes of allowing all parties to participate effectively in either the further hearing specified in paragraph (c) or in the preparation and submission of alternative plans specified in paragraph (d), Order that all parties to this suit shall be afforded reasonable and necessary access (including copies and printouts) to census data, maps, demographic information, and computer and data processing equipment, at the cost of the Commonwealth of Virginia;

(f) Grant such further relief as may be appropriate, including costs, fees, and a reasonable attorneys' fee to the plaintiff-intervenors; and

(g) Retain jurisdiction to enter such further orders in the conduct of this case as may be appropriate.

* * *

LETTER, MAY 7, 1971, ACTING ASSISTANT ATTORNEY GENERAL DAVID L. NORMAN TO C. B. MATTOX, CITY ATTORNEY OF RICHMOND, VIRGINIA

Dear Mr. Mattox:

As you know, the Supreme Court recently held in *Perkins v. Matthews*, 400 U.S. 379, 388-89 (1971), that "[c]hanging boundary lines by annexations which enlarge the city's number of eligible voters . . . constitutes the change of a

'standard, practice, or procedure with respect to voting,'" within the meaning of section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. This letter concerns your submission of a 1969 annexation to the city of Richmond.

Municipal annexations are, of course, commonly undertaken for a variety of reasons and affect a number of areas of concern to local governments. Section 5 is not addressed to annexations per se; but the Attorney General is obliged under section 5 to be concerned with the voting changes produced by an annexation. In the present instance, the city of Richmond elects representatives to its governing body on an at-large basis; its population is approximately evenly divided between whites and blacks. The submitted change would increase the city's population by approximately 43,000 new residents of whom a very small minority is Negro. In the circumstances of Richmond, where representatives are elected at large, substantially increasing the number of eligible white voters inevitably tends to dilute the voting strength of black voters. Accordingly, the Attorney General must interpose an objection to the voting change which results from the annexation.

You may, of course, wish to consider means of accomplishing annexation which would avoid producing an impermissible adverse racial impact on voting, including such techniques as single-member districts. See *Chavis* v. *Whitcomb*, 305 F. Supp. 1364 (S.D. Ind. 1969). Moreover, section 5 permits seeking approval of voting changes by the United States District Court for the District of Columbia irrespective of any previous submission to the Attorney General.

Sincerely,

David L. Norman,
Acting Assistant Attorney
General
Civil Rights Division

ANSWER OF DEFENDANTS JOAN S. MAHAN, ET AL., TO COMPLAINT AND INTERVENTION OF PLAINTIFF INTERVENORS, WILLIAM S. THORNTON, ET AL.

Now come the defendants, Joan S. Mahan, et al., by counsel, the Attorney General of Virginia, and in response to the Complaint in Intervention filed herein state as follows:

First Defense

Defendants adopt as part of their Answer herein, the Answer heretofore filed in response to the Complaint in this case as though fully set forth herein.

Second Defense

In further response to the First Count of plaintiff intervenors' Complaint, defendants aver as follows:

(A) That plaintiff intervenors fail to state a cause of action in that:

(1) They have shown only population by race of the cities of Richmond, Norfolk, Portsmouth, Newport News, and Hampton which, by itself, is immaterial;

(2) No allegations have been asserted that Negroes are ghettoized and prohibited from exercising a voting block influence over the election of any candidate to any public office;

(3) In fact the black population of each of the above named cities exerts a decisive and effective voice in the election of senators and delegates from said cities.

(4) Plaintiff intervenors have no constitutional right to the formation of homogeneous legislative districts.

(5) Plaintiff intervenors express only their political preference and not the personal, constitutional right of individual Negro citizens of the cities named.

(B) That multiple-member districts are not a *per se* violation of constitutional requirements even where a jurisdiction has a cognizable racial or political element of the voting population.

(C) That in any regard, the case of *Chavis* v. *Whitcomb*, 305 F.Supp. 1364 (307 F.Supp. 1362) (S.D. Ind. 1969), now pending in the Supreme Court of the United States will, if decided on the merits, be dispositive of plaintiff intervenors' Complaint and this court should abstain from ruling on the substantitive issues raised pending such decision.

Third Defense

In further response to the Second Count of plaintiff intervenors' Complaint, defendants aver as follows:

(A) Defendants admit the allegations of Paragraph 14 of the Second Count, except as to the political jurisdictions of the Cities of Norfolk and Newport News where the type of representation and number of representatives was not changed, each previously having and still having multi-member representation with seven and three delegates, respectively, assigned to each jurisdiction.

(B) Admit the allegations of Paragraph 16 of the Complaint, except that the bill in question was delivered on March 2, 1971, directly to the Attorney General of the United States by the Governor of the Commonwealth of Virginia.

(C) That the allegations of Paragraphs 17, 18, 19 and 20 are all factual matters which will be supported by appropriate documents that defendants would be willing to stipulate to.

(D) Defendants deny the allegations of Paragraphs 21, 22 and 23 of the Complaint.

Wherefore, having fully answered, the defendants move the Court as to Count One of the Complaint to dismiss the same for failure to state a cause of action, or, in the alternative, to postpone a decision on the substantive issues raised by the litigation, pending a determination by the Supreme Court of the United States in *Chavis* v. *Whitcomb, supra.* As to Count Two, defendants pray this Court find that the Commonwealth of Virginia has fully complied with the requirements of 42 U.S.C.A. § 1973 (c) in that the Acts in question were submitted to the Attorney General of the United States and may now be enforced, since the Attorney General has failed to interpose any objection within sixty days after such submission. Additionally, defendants pray that they recover their costs in this behalf expended.

* * *

MOTION FOR SUMMARY JUDGMENT

In accordance with the provisions of Rules 56 (b) and (c) of the Federal Rules of Civil Procedures, defendants Edgar A. Prichard, et al., by counsel, hereby move the Court to enter summary judgment for the defendants against black plaintiff-intervenors on the ground that the pleadings present a matter of law now settled that said intervenors are not entitled to single member districts. Further, the only issue presented is based upon a question of law, in that defendants aver that the stipulation heretofore filed herein,

black plaintiff-intervenors Exhibit #4, was in fact not fully agreed to by counsel and move the Court to withdraw the same. Defendants are entitled to and will demonstrate that they are entitled to judgment as a matter of law.

Defendants rely upon the following authorities in support of this Motion:

Mann v. *Davis,* 245 Fed. Supp. 241 (E.D. Va. 1965); *Chavis* v. *Whitcomb,* ..... U.S. ..... (June 7, 1971); *Carnegie Steel Co.* v. *Cambria Iron Co.,* 185 U.S. 403, 22 S. Ct. 698 (1902).

STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto as follows:

A

Within the state legislative districts for the metropolitan areas of Hampton, Newport News, Norfolk, Portsmouth and Richmond (House District Nos. 33, 35, 39, 41, 42, 49, 50, and 52) there now exist clearly definable "ghetto" areas. That is, there are within those urbanized areas, sections which are primarily residential in nature and which are characterized by a relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area. Furthermore, these sections typically are inhabited predominantly by members of racial, ethnic, or other minority groups, most of whom are of lower socio-economic standards than the prevailing standards in the metropolitan area. Finally, those who reside in these so-called ghettos do so largely as a result of social, legal, and/or economic restrictions or customs.

B

It is apparent that the ghetto sections of these five urban areas are readily identifiable from surrounding sections. Moreover, it is equally as apparent that the residents of these ghetto sections have a special interest in the areas of substantive law such as housing regulations, welfare programs, garnishment statutes, and unemployment compensation, among others.

C

Each of the black plaintiff-intervenors is black and resides in the City of Richmond, is over the age of 21, and is otherwise qualified to vote in all elections held in the City of Richmond. Black intervenors William S. Thornton and Philmore Howlette actively participated in the proceedings leading to the action of the Attorney General of the United States taken pursuant to 42 U.S.C. #1973c. The black plaintiff-intervenors adequately represent the class of black voters who are the intended beneficiaries of the Voting Rights Act's protections.

D

None of the current legislators representing the legislative districts for the five metropolitan areas reside within the ghetto areas of those districts.

E

That Dr. William S. Thornton, if called, would testify in accordance with the affidavit dated May 21, 1971 and submitted herein as black plaintiff-intervenors Exhibit #3.

F

No stipulation herein made is to be taken as an admission that any fact is relevant or material, or is to be accorded any particular effect or weight. Each party reserves the right to introduce such additional evidence, depositions, testimony, or affidavits as the rules and this court will permit and the right to cross-examine any witness whose testimony is herein stipulated.

Affidavit

District of Columbia }
City of Washington } ss.:

I, R. STEPHEN BROWNING, one of the attorneys for the black plaintiff-intervenors, do depose and say as follows:

The 1970 Decennial Census of Population made by the United States Bureau of the Census is reported both in printed form and, in greater detail, on a series of computer tapes for each state. For Virginia, there is presently available the "First Count Summary Tape," which provides certain population and housing information by various units of population. Among the information available on the First Count are a number of categories relevant in defining the boundaries of areas, like "ghetto areas," containing identifiable "racial or political elements of the voting population," *Fortson* v. *Dorsey,* 379 U.S. 433, 439 (1965); *Chavis* v. *Whitcomb,* 305 F. Supp. 1364 (S.D. Ind. 1969).

The attached printouts show, for each "census tract" (an area usually containing 4000-6000 people) in the standard metropolitan statistical areas (SMSA's) containing Richmond (SMSA 6760), Norfolk-Portsmouth (SMSA 5720), and Newport News-Hampton (SMSA 5680), the following information, among others:

1. Printout No. 1 contains for each census tract the population figures, by number and percentage, for each of the categories white, black, and "other."
2. Printout No. 2 contains for each census tract the following:
   a. Percentage of homes with values of less than $15,000 (column 5);
   b. Percentage of housing units with monthly rentals of less than $80.00 (column 6);
   c. Percentage of units with more than one person per room—"overcrowded" (column 8); and
   d. Percentage of units without adequate plumbing (column 9).

This information, when plotted on census maps, provides the raw material for beginning to define a "ghetto area." In order to make the initial definition (which is subject to refinement by using additional information, and by breaking it down for units other than census tracts), I included in a ghetto area each census tract 60 percent or higher black population and having two or more of the following characteristics:

1. more than 60 percent of owned homes with values of less than $15,000;
2. more than 60 percent of the rented units with rents of less than $80.00 per month;
3. more than 15 percent of the people living in overcrowded conditions; and
4. more than 5 percent of the people living in houses without adequate plumbing facilities.

As so defined, the ghetto areas for the five cities in question are as follows:

Richmond:

—90% black: 103, 107, 110, 201-209, 301, 302, 402

—60% black: 108, 109, 211, 411, 413-415, 601-604

Total ghetto population: 102,001

Total ghetto black population: 88,980

Norfolk-Portsmouth:

—90% black: 25, 27, 30, 34, 41-45, 47, 48, 50, 52, 53, 58, 111, 112, 114, 117, 119, 120, 20902, 21302, 3501, 3502

—60% black: 36, 46, 51, 105, 110, 118, 121, 202, 207, 4001, 21302

Total ghetto population: 122,820

Total ghetto black population: 113,157

Newport News-Hampton:

—90% black: 302, 304-308

—60% black: 120,303

Total ghetto population: 37,972

Total ghetto black population: 35,943

/s/ R. Stephen Browney

Sworn to and subscribed before me this 21st day of May, 1971.

/s/ Helen P. Marion
Notary Public

My Commission Expires: June 1, 1975

STATE OF VIRGINIA:
CITY OF RICHMOND, to-wit:

This day personally appeared before me, the undersigned Notary Public in and for the City of Richmond in the State of Virginia, William S. Thornton who made oath that the following statements are true to the best of his information, knowledge and belief:

For the past fifteen years I have been active with statewide political organizations and for the past seven years I have served as Chairman of the Crusade for Voters of Virginia. In this position I have gained knowledge of the political, economic, and social interests and conditions which exist in the political jurisdictions throughout the State of Virginia, particularly in the cities of Richmond, Norfolk, Portsmouth, Newport News, and Hampton.

Each of the black plaintiff-intervenors in the above captioned cause is black and resides in the City of Richmond, is over the age of 21, and is otherwise qualified to vote in all elections held in the City of Richmond. Black intervenors William S. Thornton and Philmore Howlette actively participated in the proceedings leading to the action of the Attorney General of the United States taken pursuant to 42 U.S.C. #1973c.

In each of the above named cities, black people constitute a cognizable minority who generally share political, economic and social interests on many questions which diverge significantly from the interests of the white population.

The above-described minorities are large enough and concentrated enough to have a significant or decisive ability to elect or participate in the election of a candidate or candidates of their choice, if the districts are fairly drawn.

The creation of large multi-member districts in these cities, however, with representatives elected at-large, op-

erates to minimize and cancel out the voting strength of the above-described racial and political element of the voting population.

The floterial districts for Richmond and Portsmouth (Districts 35 and 42) further dilute the black voting strength by combining those cities with neighboring areas whose percentage of black population is considerably smaller.

Within the state legislative districts for the metropolitan areas of Hampton, Newport News, Norfolk, Portsmouth and Richmond (House District Nos. 33, 35, 39, 41, 42, 49, 50, and 52) there now exist clearly definable "ghetto" areas. That is, there are within those urbanized areas, sections which are primarily residential in nature and which are characterized by a relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area. Furthermore, these sections typically are inhabited predominantly by members of racial, ethnic, or other minority groups, most of whom are of lower socio-economic standards than the prevailing standards in the metropolitan area. Finally, those who reside in these so-called ghettos do so largely as a result of social, legal, and/or economic restrictions or customs.

It is apparent that the ghetto sections of these five urban areas are readily identifiable from surrounding sections. Moreover, it is equally as apparent that the residents of these ghetto sections have interest in the areas of substantive law such as housing regulations, welfare programs, garnishment statutes, and unemployment compensation, among others, which diverge significantly from the interests of non-residents of the ghetto.

In each of the aforementioned cities, the areas in which the large concentrations of black citizens reside have been identified by local, state and federal governmental agencies

as target areas which are eligible for special programs. See, for example, Exhibit "A" which indicates the overlapping of the anti-poverty (STOP) program area, the proposed Model Cities Program area, the Urban Renewal Project, and the Public Housing Projects of the City of Norfolk.

None of the current legislators representing the legislative districts for the five metropolitan areas reside within the ghetto areas of those districts.

Sub U

/s/ William Thornton

Subscribed and sworn to before me, the undersigned Notary Public, this 21st day of May, 1971, at Richmond, Virginia.

My commission expires: June 3, 1973

/s/ Sandra M. Owens
Notary Public

ORDER TO AMEND COMPLAINT IN INTERVENTION

On motion for leave to amend their complaint in intervention, made by the plaintiff-intervenors William S. Thornton, et al. and by others who by virtue are joined as such plaintiff-intervenors,

It is ORDERED that said motion be and the same hereby is allowed and that the complaint in intervention heretofore filed by William S. Thornton, et al. be, and the same is hereby amended by interlineation as follows:

In paragraph 1 (one), immediately preceding the words "Arthur Brown" delete the word "and"; and immediately after the words "Arthur Brown" add: "W. Lester Banks and Walter T. Kenney of the City of Richmond, Florence B. Reid of the City of Norfolk, Reuben L. Bouie of the

City of Portsmouth, Vearland F. Thompson, II, of the City of Newport News, and Nellie Harvey of the City of Hampton."

In paragraph 2 (two), delete the words "and the City of Richmond" and, at the end of the paragraph, add the sentence: "Each of the six last named intervenors resides in a part of his or her city which is inhabited predominantly by black persons most of whom are of lower socio-economic standards than the prevailing standards in his or her city."

May 24, 1971

United States District Judge

* * *

EVIDENTIARY STATEMENTS ON BEHALF OF BLACK PLAINTIFF-INTERVENORS

Pertinent figures from the 1970 Census returns are as follows:

The State	Total Population 4,648,494	Negro Population 865,388
Norfolk	307,951	87,275
Richmond	249,621	104,766
Newport News	138,177	39,208
Hampton	120,779	30,619
Portsmouth	110,963	44,325

The Constitution of Virginia as proclaimed to go into effect on July 10, 1902 initiated poll tax payments and literacy and "understanding" tests as impediments to the exercise of the right to vote. (Constitution of Virginia (1902) §§ 18 to 23, incl.). Thereafter, the election of Negroes to public office became a thing of the past and so continued to

be until 1948 when Oliver W. Hill obtained a seat on the Council of the City of Richmond.

Virginia became a one party state wherein the attainment of the nomination of the Democratic Party was tantamount to election to state-wide office and also to public office in practically all of the political subdivisions, particularly the cities of Richmond, Norfolk, Newport News, Hampton and Portsmouth.

In 1947, Oliver W. Hill, a Negro seeking the Democratic nomination (tantamount to election) for one of Richmond's seven seats in the House of Delegates, placed 8th in a field of 18, having 190 votes less than the lowest winning candidate.

In 1949, W. L. Ransome, a Negro seeking the Democratic nomination for one of Richmond's seven seats in the House of Delegates, placed 12th in a field of 17, having 4,949 votes less than the lowest winning candidate.

In 1951, Roland D. Ealey, a Negro seeking the Democratic nomination for one of Richmond's seven seats in the House of Delegates, placed 8th in a field of 14, having 2,228 votes less than the lowest winning candidate.

In 1955, Oliver W. Hill, again seeking the Democratic nomination for one of Richmond's seven seats in the House of Delegates, placed 10th in a field of 12, having 4,127 votes less than the lowest winning candidate.

In 1957, Colston A. Lewis, a Negro seeking the Democratic nomination for one of Richmond's seven seats in the House of Delegates, placed 8th in a field of 14, having 692 votes less than the lowest winning candidate.

In 1959, Thomas H. Henderson, a Negro seeking the Democratic nomination for one of Richmond's seven seats in the House of Delegates, placed 9th in a field of 9, having 1,748 votes less than the lowest winning candidate. His total

vote was 10,975; the highest vote was less than fourteen thousand.

In 1961, Colston A. Lewis, again seeking the Democratic nomination for one of Richmond's seven seats in the House of Delegates, placed 11th in a field of 12, having 4,413 votes less than the lowest winning candidate.

In 1965, Dr. Wm. Ferguson Reid, a Negro, sought the Democratic nomination for one of the eight House of Delegates seats which since 1962 had been allotted to Richmond and Henrico County. After recount he was declared to be a nominee; but he was eliminated in the general election as a result of a successful write in campaign conducted by the supporters of the candidate who had trailed him in the primary.

In 1967, Dr. Reid was again a Democratic nominee and ran as a part of a slate opposed by a slate of Republican candidates which also included a Negro. The eight Democrats were elected and, thus, Dr. Reid became the first Negro in the General Assembly since Reconstruction.

In 1969, Dr. Reid was re-elected.

In 1969, William Robinson, a Negro, placed fourth among the contestants for the Democratic primary nominations for Norfolk's seven seats in the House of Delegates. He placed seventh in the general election and, thus, became the second Negro to obtain a seat in the General Assembly in this century.

In the Special Election for the vacant Senate seat J. Fred Pollard (then Lieutenant-Governor) polled 6,115 votes, Morrill M. Crowe (former Mayor of Richmond) polled 10,318 votes and Lawrence Douglas Wilder (a Negro attorney) polled 15,839 votes. Thus, Senator Wilder became the third Negro to be elected to the General Assembly in this century.

At the November 1969 general elections in Norfolk in which William P. Robinson moved from fourth place primary nominee to seventh place (successful) candidate, one Roland Walton, a Negro who had won the Democratic primary nomination for the office of Commissioner of Revenue, lost to an independent white candidate by a vote of 16,433 to 23,864. In the primary Walton had received 10,258 votes while his two white opponents had received 9,697 votes and 10,258 votes respectively.

The 1960 Census revealed that Richmond had a total population of 219,958, of which 92,331 were white. The General Assembly in 1962 combined Henrico County with Richmond for at-large representation in the House of Delegates.

In 1969, Richmond won an annexation suit against Chesterfield County. The population now contained within the pre-annexation boundaries of the City of Richmond is 202,359, of which approximately 51.5% are black. The portion annexed from Chesterfield County has a population of 47,262, of whom fewer than 1% are black. As a result of the annexation, the total population of the enlarged city, according to the 1970 Census, is 249,621, of whom 143,857 (57.6%) are white and 104,766 (42%) are black; 0.4% being counted as "other." The Attorney General of the United States yet holds that the annexation violates the Voting Rights Act.

Not one member of the House of Delegates resides in a so-called ghetto area of the city from which he was elected. Only three Negroes have been elected to the General Assembly in this century.

* * *

DEFENDANTS' RESPONSE TO EVIDENTIARY STATEMENT ON BEHALF OF BLACK PLAINTIFF-INTERVENORS

Now come the Defendants, Joan S. Mahan, et al., by counsel, the Attorney General of Virginia, and in response to evidentiary statements on behalf of black plaintiff-intervenors state as follows:

First, some misstatements of black plaintiff-intervenors should be clarified. They intimate that Virginia has utilized an "understanding" test and that poll tax and "literacy" tests have been used discriminatorily. Section 20 of the 1902 Constitution of Virginia required that a citizen must make "application to register in his own handwriting, without aid, suggestion, or memorandum, . . ." An "understanding" test (requiring applicants to demonstrate their ability to read and explain provisions of the Constitution) which plaintiffs indicate was a part of the Constitution was not contained in the Constitution and in fact an original proposal for such a test was defeated. Debates, Const. Conv. 2937-2940, 3076-3077 (1901-1902).

Next, the poll tax requirements and literacy test requirements have never been found to be administered discriminatorily. See *Harper* v. *Virginia State Board of Elections*, 86 S. Ct. 1079 (1966); 1961 Report Civil Rights Commission Vol. I, pp. 22, 102.

The only additional comments that Defendants can make to the remaining evidentiary statements are that their allegations seem to be, as the Supreme Court has stated in *Whitcomb* v. *Chavis*, ". . . a mere euphemism for political defeat at the polls." Or, to phrase it another way, under our system of government one individual wins an election and his opponent loses the election. Defendants do not mean to imply that such a basic tenet has to be emphasized to this Court but apparently it must be emphasized to the intervening plaintiffs.

* * *

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the plaintiff-intervenors William S. Thornton, Philmore Howlette, John M. Brooks, E. L. Slade, Arthur Brown, W. Lester Banks and Walter T. Kenney, of the City of Richmond, Florence B. Reid of the City of Norfolk, Reuben L. Bouie of the City of Portsmouth, Vearland F. Thompson, II of the City of Newport News and Nellie Harvey of the City of Hampton hereby appeal to the Supreme Court of the United States from the Interlocutory Order entered in the above-captioned action on July 2, 1971 and particularly: (1) from so much thereof as denied the prayers of said plaintiff-intervenors for single-member districts for each of the above-mentioned cities, (2) from so much thereof as creates a new Thirty-eighth District composed of the City of Portsmouth and a party of the City of Chesapeake and allots to it four delegates and (3) from so much thereof as combines the City of Norfolk with a part of the City of Virginia Beach into the Thirty-ninth District and allots to it seven delegates.

This appeal is taken pursuant to 28 U.S.C. § 1253.

* * *

DEFENDANTS' EXHIBIT A

February 18, 1971

The Honorable John N. Mitchell
Attorney General of the United States
The Watergate Hotel
2650 Virginia Avenue, N.W.
Washington, D. C.

Dear John:

As I told you by telephone yesterday, we expect to complete action on our decennial reapportionment of the Virginia Senate, the House of Delegates, and the Congressional Districts by the middle of next week.

This legislation will have to be submitted to you for your review pursuant to the Voting Rights Act of 1965. If no action is taken by your office within 60 days after submission to you, the legislation will stand approved. I believe that many such legislative items have been approved in the past by inaction on the part of the Attorney General within the 60-day period.

As I told you, however, we will have elections for all members of the legislature in Virginia in 1971 and unless we have some assurance that our legislation meets with your approval, we will have serious problems with requirements for candidates meeting filing deadlines. This problem can be avoided if we can obtain your approval of our legislation before March 31. I believe that Virginia is the only State in the Union with this situation this year.

We are anxious to keep this extraordinary session of the General Assembly in session by a recess rather than adjourn until we know the outcome of the review by your office. This

procedure will permit us to make any modifications in our reapportionment legislation which might be required by your review, although in my judgment consideration of these reapportionment bills was totally free of any racial motivation or overtone, and I do not expect that you will find any objections to them.

It would therefore be particularly helpful to us if you could arrange for the review by your office to be complete somewhat before March 31 in order that we can adjourn the session of our General Assembly, sine die, not later than March 31. Such action will enable the new legislation to take effect in time to avoid any conflict with the election process this fall.

I will hand deliver the legislation to you, with the official request for review by your office, just as soon as it is passed. I hope, however, that you can indicate to me that this review can be completed somewhat in advance of March 31. This will be very helpful to us for our planning purposes.

It was good to talk to you; please give my best regards to your pretty bride.

Cordially yours,
Linwood Holton

DEFENDANTS' EXHIBIT B

Commonwealth of Virginia
Office of the Governor
Richmond 23219

March 1, 1971

The Honorable John M. Mitchell
Attorney General of the United States
Washington, D. C.

Dear John:

Pursuant to the requirements of Section 5 of the 1965 Voting Rights Act, I submit to you herewith the following acts of the 1971 General Assembly:

House Bill No. 63 (Reapportionment of the Virginia House of Delegates)

House Bill No. 191 (Reapportionment of the U. S. Congressional Districts)

Senate Bill No. 53 (Changes to the Virginia Election Law)

Senate Bill No. 54 (Reapportionment of the Virginia Senate)

Additional related information, which I believe should be self-explanatory, is enclosed. If your staff has any questions or needs further information, Virginia Attorney General Andrew P. Miller will be more than happy to comply immediately with your requests. Please contact him through his assistant, Anthony F. Troy at 703/770/2071.

As I told you in my letter of February 18, we will need to know the results of your review by March 27, 1971, in

order that the Virginia General Assembly can take corrective action, if necessary, when it reconvenes on March 29, 1971.

Cordially yours,
Linwood Holton

DEFENDANTS' EXHIBIT C

Mar 16 1971

Honorable Linwood Holton
Governor of Virginia
Richmond, Virginia

Dear Governor Holton:

This is in reference to your submission to the Attorney General under Section 5 of the 1965 Voting Rights Act of the reapportionment of state senator, delegate and congressional districts in Virginia which was received by this Department on March 1, 1971. This also confirms a telephone conversation between Anthony Troy of the Virginia Attorney General's office and departmental attorney Peter Mear on March 11, 1971.

After a preliminary examination of the initial submission, this Department has determined that the data sent to the Attorney General is insufficient to properly evaluate the changes you have submitted. In order to fulfill its responsibilities under federal law in determining the effect of changes with respect to elections and voting, this Department must have as much racial information and legislative history as is available. In this regard would you please assist us by providing this Department, as soon as possible, the following information.

1. The total number of registered voters in each county and city and in each senatorial, delegate and congressional district, both before and (an estimate of the totals) after the submitted reapportionments;

2. The racial population of each county and city and of each senatorial, delegate and congressional district before and after the submitted reapportionments;

3. The names, home addresses and race of each state senator, delegate and U. S. Congressman;

4. The legislative history of each reapportionment (the date and names of the sponsoring legislators for each bill, the date and names of sponsoring legislators for each amendment, the date of the final passage of the bills and the names of each legislator who voted in opposition to the bill or any amendment thereof);

5. A map showing the precise district boundary for any senate, delegate or congressional district which divides any county or city;

As you know, the Attorney General has a 60-day period to consider enactments submitted pursuant to section 5. This time period will begin to run when the Department has available the information necessary to evaluate your changes.

If we can assist you in any way in gathering the information necessary to make your submission complete or should you wish to discuss any questions raised by this letter, please do not hesitate to call on me or my staff.

Sincerely,

JERRIS LEONARD
Assistant Attorney General
Civil Rights Division

cc: Mr. Anthony F. Troy
Assistant Attorney General
Richmond, Virginia 23219

DEFENDANTS' EXHIBIT D

March 21, 1971

Mr. Jerris Leonard
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C.

Dear Mr. Leonard:

I hand you herewith the information requested in your letter of March 16, 1971, to the Honorable Linwood Holton, Governor of Virginia, as further delineated in conversations between myself and Mr. Peter Mear of your office on March 17, 1971.

The information is as follows corresponding to your five numbered requests:

First, enclosed is the total number of registered voters for each county and city of the Commonwealth as of January 1, 1970. Mr. Mear informs me that this information is needed to properly determine the effect the petition signature provision of 250 voters will have, as required by amendments to § 24.1-168 and § 24.1-185. We have therefore indicated those election districts wherein 250 signatures would be more than presently required by the 1% provision.

Second, enclosed is the total racial population for the old and new election districts of Norfolk, Richmond, and their adjacent areas and of the Congressional Districts. Again it is our understanding from Mr. Mear that racial population as supplied is sufficient for the purposes of the Department.

Third, enclosed are the names and addresses of each member of the General Assembly and each United States Con-

gressman from the Commonwealth. (The names and addresses of the three black representatives in the General Assembly have previously been supplied to Mr. Mear.)

Fourth, enclosed is what legislative history is available, including that relating to amendments which were rejected, and the yeas and nays whenever a rollcall vote was recorded.

Fifth and last, enclosed are maps of all election district lines which cut across political boundaries.

Sincerely yours,

Anthony F. Troy
Assistant Attorney General

AFT/fpl
Enclosures

DEFENDANTS' EXHIBIT M

[Letterhead Omitted]

Office of the Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
703-770-2071

March 29, 1971

The Honorable Joan S. Mahan
Secretary, State Board of Elections
State Capitol
Richmond, Virginia 23219

My dear Mrs. Mahan:

I am in receipt of your inquiry regarding, *inter alia*, whether candidates for the November 1971 General Assembly election may file for the June primary notwithstanding that by the filing deadline of April 9th the Attorney General of the United States, acting under the provisions of the Voting Rights Act of 1965, will not have indicated if he has objections to the Virginia reapportionment plans, nor will the 60 day period for interposing such objections have expired.

The reapportionment Acts, passed by the 1971 session of the General Assembly, became law upon the Governor's signature and took effect immediately in accordance with the provisions of Art. II, Sec. 6, of the revised Constitution of Virginia. The question remains, in light of the provisions of the Voting Rights Act of 1965 to which Virginia is subject, as to when such Acts may be implemented.

Pertinent to this question is Sec. 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (c), which sattes:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission. . . ."

You will note from this language that the purpose of the Act is to insure that no person shall be denied the right to vote for failure to comply with any qualification, prerequisite, standard, practice or procedure unless the same shall first have been submitted to the Attorney General without objection subsequently being interposed or a declaratory judgment secured that the change does not have the effect

of denying or abridging the right to vote on account of race or color.

The first date on which implementation of the reapportionment Acts could possibly effect any person's right to vote would be the primary election date of June 8 ,1971.

All other practices and procedures including filing of candidacies for such primary are in conformity with the provisions of the election laws of Virginia, Title 24.1 of the Code, which became effective December 1, 1970, and have been submitted to the Attorney General, who interposed no objection.

Consequently I am of the opinion that individuals may, pursuant to the provisions of the election laws presently being administered, file as candidates for the newly created districts between March 25, 1971, and April 9, 1971, notwithstanding that the new districts have not yet been implemented, as long as they can be implemented by the date of the primary.

There can be no doubt that, in the absence of interposition by the Attorney General, such implementation is possible since the sixty day period provided by Sec. 5 of the Voting Rights Act of 1965 will expire on May 1, 1971.

Since Art. II, Sec. 6, of the revised Constitution requires reapportionment of the General Assembly in 1971, previously existing legislative districts have no validity with respect to the November general election of this year nor to any legislative primary conducted in connection therewith.

With kindest regards, I remain

Sincerely yours,

Andrew P. Miller
Attorney General

APM:T

DEFENDANTS' EXHIBIT N

Commonwealth of Virginia
Office of
The Attorney General
Richmond

May 3, 1971

Mrs. Joan S. Mahan, Secretary
State Board of Elections
101 State Finance Building South
Richmond, Virginia 23219

My dear Mrs. Mahan:

I am in receipt of your letter of April 27, 1971, which reads as follows:

> "In consideration of the requirements of Section 5 of the Voting Rights Act of 1965, it will be appreciated if you will render your opinion as to the effective date of Chapter 119 [the amendments to the election laws] and the reapportionment bills, Chapters 116, 118 and 120 which were forwarded to the Attorney General of the United States on March 2, 1971."

As indicated in the ruling to you, issued by this office on March 29, 1971, the Reapportionment Acts became law upon the Governor's signature and also became effective upon his signature, in accordance with the provisions of Article II, Section 6 of the revised Constitution of Virginia. The amendments to the Election Laws, Title 24.1 of the Code of Virginia (1950) contained in Chapter 119 similarly became law upon signature of the Governor and their effective date is as indicated by Section 2 of the Act which reads:

"The amendments to § 24.1-90 shall be effective on and after January one, nineteen hundred seventy-three. The amendments to §§ 24.1-31, 24.1-86, 24.1-227, 24.1-228 and 24.1-229 shall be effective at noon, July one, nineteen hundred seventy-one. An emergency exists and all other provisions of this act are in force from its passage."

However, as indicated in our previous ruling, though an Act may become law and be effective, there still remains the question whether such laws may be implemented.

As we have previously advised, changes in voting procedures and laws may not, after they are effective, be implemented immediately; Virginia being one of the States subject to the 1965 Voting Rights Act, 42 U.S.C. § 1973, et seq. Section 5 of the Voting Rights Act provides that any change in law affecting voting procedures may be enforced by a State if such change has been submitted to the Attorney General of the United States ". . . and the Attorney General has not interposed an objection within sixty days after such submission. . . ."

The four Acts of the General Assembly about which you inquire were personally delivered by the Governor to the Attorney General of the United States on March 2, 1971. They were submitted as required by *Allen* v. *Board of Elections,* 393 U.S. 544, 571, 22 L.ed.2d 1, 89 S.Ct. 817 (1969), in an "unambiguous and recordable manner . . . directly to the Attorney General with a request for his consideration pursuant to the Act." There can be no doubt that such delivery constituted a submission.

Additionally, submitted with the Acts was related information, including maps showing the changed boundaries of the Congressional, Senate and House legislative districts,

in order to enable the Attorney General to understand the changes proposed.

A request for further information was subsequently received from the Department of Justice on or about March 18, 1971, and immediate fulfillment of that request was made four days later (including a weekend). That was immediately followed up the next day, March 23, 1971, by this office personally going to the Department of Justice and advising them in detail as to all changes and reasons for such changes. A subsequent visit to this office was made by the Department of Justice on April 6, 1971, for an additional conference. Numerous phone calls were also made with an attempt always to provide promptly documented responses to all inquiries, including responses to written complaints received by the Department of Justice from various sources, the majority of which complaints, if not all, were received between February 24, 1971, and March 11, 1971.

Pertinent to your inquiry, this office has received no communication from the Attorney General regarding the Acts in question and it has been verified that no letter has been sent by the Attorney General with regard to the submission of March 2, 1971. The sixty day period from that date expired on May 1, 1971, and I am unaware of any provision that would extend the period in question. Consequently the Reapportionment Acts and those revisions of the election laws contained in Chapter 119 which have become effective may now also be implemented; ". . . the Attorney General . . . not interpos[ing] an objection within sixty days after . . . submission. . . ."

The language of the Voting Rights Act, specifically 42 U.S.C. § 1973 (c) cannot be plainer. It is unambiguous and expresses the clear intent that there be a sixty day period provided, within which the Department of Justice is given

power to administratively disapprove any changes in voting procedures. At the expiration of this period so also expires the Attorney General's power to administratively disapprove. Failure to disapprove, however, does not bar any subsequent action to enjoin in a legal proceeding the enforcement of a qualification, standard, practice or procedure affecting the right to vote.

An interpretation of the Act allowing the Attorney General to extend the sixty day period merely by asking for additional information would indefinitely postpone the implementation of any voting procedure. It would further be contra to the Congressional purpose in establishing the sixty day submission period and would destroy certainty with regard to all election processes, creating chaos in the representative form of government mandated by the Constitution of the United States.

Any departure from the mandate of the statute should be only by legislative amendment thereto.

All other changes affecting voting procedures were submitted to the Attorney General on March 23, 1971, and the sixty day period for review of those changes will not expire until May 22, 1971, at which time they may be implemented, there being no objection by the Attorney General.

With kindest regards, I remain

Sincerely yours,

Andrew P. Miller
Attorney General

13-35

DEFENDANTS' EXHIBIT Q

The Library Of Congress
Washington, D. C. 20540

Legislative Reference Service

Legislative History Of Voting Clearance Procedure Authorized By Sections 3(c) And 5 Of The 1965 Voting Rights Act

In his message requesting legislation guaranteeing the right to vote, the President called for the adoption of a proposal which, among other things, would "[p]rohibit the use of new tests and devices wherever they may be used for discriminatory purposes." House Document No. 117, 89th Congress, 1st Session, at page 12. The provision, in effect embargoing new voting requirements in jurisdictions whose existing tests and devices were suspended by virtue of the proposal's administrative triggering mechanism was contained in section 8 of the original Administration bill. (H.R. 6400; S. 1564, 89th Congress, 1st Session.) As introduced, the clearance procedure was exclusively judicial, that is, the affected jurisdiction would have to submit any proposed new or changed voting requirement or procedure to a three-judge court in the District of Columbia before it could be enforced.

> Sec. 8. Whenever a State or political subdivision for which determinations are in effect under section 3(a) shall enact any law or ordinance imposing qualifications or procedures for voting different than those in effect on November 1, 1964, such law or ordinance shall not be enforced unless and until it shall have been finally adjudicated by an action for declaratory judgment

brought against the United States in the District Court for the District of Columbia that such qualifications or procedures will not have the effect of denying or abridging rights guaranteed by the fifteenth amendment. All actions hereunder shall be heard by a three-judge court and there shall be a right of direct appeal to the Supreme Court.

The Senate Committee on the Judiciary to which the bill had been referred with instructions to report no later than April 9, held hearings on S. 1564 on March 23, 24, 25, 29, 30, 31, and April 1, 2, 5, 1965. The Committee met in executive session on April 6, 6, 8, and 9, 1965 and reported the bill, with amendments in the nature of a substitute, but without recommendation, on April 9, 1965 (Senate Report No. 162, 89th Congress, 1st Session).

The Senate substitute retained the essential features of the President's bill but revamped the proposal in a great many particulars not the least of which was a number of significant changes in the procedure for enforcing a new or changed voting requirement. To begin with, the procedure was authorized in two sections: section 3(c) and section 5. The former had relevance to jurisdictions individually sued by the Attorney General for voting rights denials. The latter, as had been true of former section 8, applied to states and localities which were prohibited from applying test and devices by virtue of their failure to comply with the 50 percent registration or voter participation requirement. Also, the substitute altered the procedure whereby a state or locality in these circumstances could obtain approval necessary to enforce a new or changed requirement. Under the revised bill, the court would have to order the affected jurisdiction, through its chief legal officer, to submit any such new requirement or change to the At-

torney General. If the Attorney General did not object to enforcement of the new or altered voting requirement within 60 days of its submission to him, it would become effective. Conversely, if the Attorney General did make timely objection, the affected jurisdiction had then to resort to the courts in the manner exclusively provided by section 8 of the original proposal.

The language of section 3(c) of the Senate substitute follows:

> If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and shall order that during such period any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be submitted to the Attorney General. If the Attorney General files objection with the Court within sixty days after such qualification; prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to him, such qualification, prerequisite, standard, practice, or procedure shall not be enforced unless and until the court finds that it does not have the purpose or will not have the effect of denying or abridging the right to vote on account of race or color; except that neither the court's finding nor the Attorney

General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure.

The language of section 5 of the Senate substitute follows:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose or will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure unless such qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission. Neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Such an action shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code

and any appeal shall lie to the Supreme Court. S. 1564, 89th Congress, 1st Session [Report N. 162].

None of the various parts—3 parts in all—that comprise the Senate report disclose the reason for the change in the clearance procedure or cast any light whatsoever on the sixty day period allowed the Attorney General to scrutinize changed or new requirements or procedures. Part 3 of the report containing the views of twelve members does little more than note the fact that the provisions of former section 8 were now set out at sections 3(c) and 5 and paraphrase the language of both. Thus, with respect to "subsection 3(c)" the report states:

> The substance of section 8 of the bill as introduced has been retained in this subsection and in section 5 of the bill as reported. This provision is intended, by providing for judicial scrutiny of new or changed voting requirements, to insure against the erection of new discriminatory voting barriers by State or political subdivisions which have already been found to have discriminated.
>
> Subsection 3(c) as reported provides that if in a lawsuit brought by the Attorney General the court finds violations of the 15th amendment justifying equitable relief, jurisdiction shall be retained as appropriate and the court shall order that any voting qualification, prerequisite, standard, practice, or procedure different from that in force or effect when the action was brought shall be submitted to the Attorney General. If the Attorney General files an objection with the court within 60 days after such submission to him by the chief legal officer or other appropriate official of the State, the voting qualification, prerequisite, standard,

practice, or procedure in dispute shall not be enforced unless and until the court finds that it does not have the purpose or will not have the effect of denying or abridging the right to vote on account of race or color. Neither the court's finding nor the Attorney General's failure to object is to constitute a bar to a subsequent action, for example one growing out of the applications of practice or procedure which had been found unobjectionable on its face, to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure. Senate Report No. 162, op cit., *supra*, at 20-21.

Later on in the same report, the following remarks are made concerning section 5 of the committee reported bill:

This section deals with attempts by a State or political subdivision with respect to which the prohibitions of section 4 are in effect to alter by statute or administrative acts voting qualifications and procedures in effect on November 1, 1964. The section is a substitute for section 8 of the bill as introduced.

Section 5 now permits a State or political subdivision to enforce a new or changed requirement if it, through its chief legal officer, submits the new requirement or change to the Attorney General and the Attorney General does not interpose objections within 60 days.

If the new qualification, prerequisite, standard, practice, or procedure is not submitted to the Attorney General, or if it is submitted and he interposes an objection, then the State or subdivision which is within section 4(a) will not be able to enforce the new requirements without obtaining a declaratory judgment that such new qualifications, prerequisites, standards, practice, or procedure both do not have the purpose

will not have the effect of denying or abridging rights guaranteed by the 15th amendment. Any such action for declaratory judgment must be brought before a three-judge District Court for the District of Columbia. There is a right of direct appeal to the Supreme Court for the District of Columbia. There is a right of direct appeal to the Supreme Court.

Neither the Attorney General's failure to interpose an objection or the entry of a declaratory judgment under this section will bar any subsequent actions, for example, one growing out of the application of a practice or procedure which had been found unobjectionable on its fact (sic), to enjoin the enactment or enforcement of a new or changed voting qualification, prerequisite, standard, practice, or procedure. *Id.*, at 24.

(The printed record of the Senate hearings are similarly silent. Although there was criticism leveled at the original bill's section 8, nothing said in connection therewith illuminates what motivated the Committee's subsequent revamping of the clearance procedure along the lines noted above. See *Voting Rights,* Hearings before the Committee on the Judiciary, United States Senate, 89th Congress, 1st Session, on S. 1564, at pages 237, 622, 652, 672, 764, 991.)

During the debate opponents of the measure attacked sections 3(c) and 5 as intrusions upon state sovereignty and conferring unlimited power upon the Attorney General. 111 Cong. Rec. 8368, 9794, 10571, 10573, 10745, 10853, 10861, 11023, 11079, 11081, 11091 (1965). Aside from these general attacks, neither provision was subject to the searching kind of inquiry one normally expects of such precedent-making proposals. On April 30, 1965, the Senate leadership put forward an amendment in the nature of a

substitute for the committee recommended substitute. This version, which eventually would be passed by the Senate on May 26, 1965, did not alter the text of section 3(c) or 5 from that contained in the committee recommended substitute. 111 Cong. Rec. 11752 (1965). At no point in the debate did the 60-day period during which the Attorney General might object to the enforcement of new or changed voting requirements or procedures elicit any comments.

Subcommittee No. 5 of the House Committee on the Judiciary held hearings on H.R. 6400 and other proposals to enforce the Fifteenth Amendment on March 18, 19, 23, 24, 29, 30, 31 and April 1, 1965. Upon conclusion of the hearings, the subcommittee met in executive session for 4 days to consider the legislation and thereafter made its recommendations to the Judiciary Committee.

The full Committee on the Judiciary considered the bill for 10 sessions and submitted a report on June 1, 1965. House Report No. 439, 89th Congress, 1st Session. The Committee report changed sections 3(c) and 5 slightly so that rather than requiring the court to order submission of new voting laws to the Attorney General, a moratorium on such laws would go into effect and remain in effect unless cleared by the Attorney General either affirmatively or by failing to interpose an objection within 60 days of its submission to him or in the alternative, by a three-judge court in the District of Columbia.

The language of section 3(c) recommended by the Committee follows:

> If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State of political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred

within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commended shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that the Attorney General's failure to object shall not bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

The language of the Committee recommended version of section 5 follows:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, it may institute an action in the United States

District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that the Attorney General's failure to object shall not bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

As was the case in the Senate, the Committee report's commentary on these sections was limited to an abbreviated summary of what they would do. Thus, at page 13, appears the statement that "section 3 further authorizes the court to determine the validity of any voting standard or practice which is different from that which was in effect when the suit was instituted." The following statements regarding sections 3(c) and 5 appear in the bill analysis portion of the report:

Subsection 3(c).—This provision is intended, by providing for judicial scrutiny of new or changed voting requirements, to insure against the erection of new and onerous discriminatory voting barriers by State or political subdivisions which have been found to have discriminated.

Subsection 3(c) provided that whenever the Attorney General brings an action against any State or subdivision to enforce the 15th amendment or implementing legislation, and the court has found that violations of the 15th amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court shall retain jurisdiction for such period as it may deem appropriate. During such period no voting qualifications, prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the action was brought shall be enforced until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

A provision in this subsection authorizes the enforcement of a new or changed qualification, prerequisite, standard, practice, or procedure without resort to the court if the qualification, prerequisite, standard, practice, or procedure is submitted by the appropriate State or local official to the Attorney General and the Attorney General does not interpose an objection within 60 days of such submission. The Attorney General's failure to object shall not bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

Section 5

This section deals with attempts by a State or political subdivision with respect to which the prohibitions of section 4 are in effect to alter by statute or administrative acts voting qualifications and procedures in effect on November 1, 1964.

Section 5 permits a State or political subdivision to enforce a new or changed requirements if it, through its chief legal officer, submits the new requirement or change to the Attorney General and the Attorney General does not interpose objections within 60 days.

If the new qualification, prerequisite, standard, practice, or procedure is not submitted to the Attorney General, or if it is submitted and he interposes an objection, then the State or subdivision which is within section 4(a) will not be able to enforce the new requirements with obtaining a declaratory judgment that such new qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging rights guaranteed by the 15th amendment. Any such action for declatory judgment must be brought before a three-judge District Court for the District of Columbia. There is a right of direct appeal to the Supreme Court.

The Attorney General's failure to interpose an objection will not bar any subsequent actions to enjoin the enactment or enforcement of a new or changed voting qualification, prerequisite, standard, practice, or procedure. *Id.*, at 23-24, 26.

(Save for an observation by former Congressman John Lindsay that the original version's clearance procedure might be modified to enable "the Attorney General ... [to]

agree to amendments . . . [to state election laws and thus obviate] a court proceeding," this aspect of the bill went virtually unnoticed during the House hearing. *Voting Rights.* Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 89th Congress, 1st Session, on H. R. 6400, at page 371. See also pages 59-62, 72, 613, 656, 679, 695. Since the former New York Congressman's statement was made before issuance of the Senate report of the bill, his remarks appear to be quite spontaneous. Of course, the House Committee report recommended clearance procedures similar to those contained in the Senate-passed measure.)

House debate on the measure hardly touched on the clearance procedure, and nothing was said regarding what kind of a submission kicked-off the 60-day limitation during which the Attorney General could object to the enforcement of any changed requirement or procedure. See 111 Cong. Rec. 15648, 15721, 16226 (1965).

The House-passed measure differed from the Senate version approved earlier and a conference was requested in both bodies to iron out these discrepancies. The House version of the clearance procedure which did not require the court to order suspension of any new or changed voting requirement was approved. In the words of the Statement Of The Managers On The Part Of The House:

> The House version [of section 3] respecting the court-imposed moratorium on new voting laws was adopted in lieu of the Senate provision requiring that the court order the submission of new voting laws to the Attorney General.
>
> * * *
>
> Section 5 of the House bill is similar to the Senate bill, except that the Senate version provides that a

declaratory judgment approving the use of a new voting requirement will not bar a subsequent lawsuit to enjoin the use of such a requirement. The conference report adopts the House version with a clarifying amendment and with the Senate provision described above. House Report No. 711, 89th Congress, 1st Session, at pages 11 and 12.

/s/ R. J. Celada
Raymond J. Celada
Legislative Attorney
American Law Division

May 17, 1971
Ext. 6012

DEFENDANTS' EXHIBIT R

September 21, 1970

Honorable A. F. Sumner
Attorney General
State of Mississippi
Jackson, Mississippi 39201

Dear Mr. Attorney General:

This is in response to your submission of House Bills 362 and 363 (The "Open Primary" Law) which you submitted on July 23, 1970 to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965.

Under the Voting Rights Act submitted legislation may be enforced if the Attorney General has not interposed an objection within 60 days after submission. Such an objection is entered when the legislation has the "purpose" or the "effect" of "denying the right to vote on account of race or color."

Since receiving this submission we have carefully examined these acts in light of the statutory standards. We have also solicited additional facts from various knowledgeable sources in Mississippi as to the legislative "purpose" and "effect," and, in fact, are still in the process of receiving and analyzing the considerable information furnished in response to our inquiries.

The problem posed by these enactments is extremely complex. As you know the acts in question eliminate party primaries in most elections and provide for a two-step general election in which all candidates participate with the two highest participating in a run-off election. The Voting Rights Act requires the Attorney General to determine the purpose with which the legislature acted and to project the effect that the statutes will have. With respect to the Open

Primary bills the contention of some is that one purpose of the acts is to deny to independent Negro candidates the opportunity which they have under existing law to run for and be elected to office in the general election with a plurality of the votes cast. While this purpose is not apparent on the face of the acts, there appear to be some indications from the reported statements of proponents and the statements of purpose made with respect to prior similar proposals, that support this view. If this were established as a significant purpose of the acts I believe they would be objectionable under the Voting Rights Act and under applicable judicial precedents.

On the other hand, the facts presently available to us do not conclusively establish that the present acts are afflicted with a racial purpose or that there is no other compelling reason for the State to have adopted them. Moreover, we have been unable to reach the conclusion that the projected effect would be to deprive Negro voters of rights under the Voting Rights Act.

Under the law, the determination of issues such as legislative purpose and effect, involves the detailed consideration of voluminous materials and, if done fairly and comprehensively, an analysis of fact and law that we have simply been unable to complete within the alloted time. I note in passing that the complexities presented by this kind of issue prompted the Attorney General to suggest to Congress that the questions presented by Section 5, could best be resolved in adversary judicial proceedings with a full range of discovery techniques, the power to compel the attendance and testimony of witnesses and production of documents, and the opportunity for deliberate consideration unlimited by arbitrary time restrictions.

Under these circumstances, the Attorney General is not prepared at this time—60 days after receipt of these statutes

—to make any determination of the validity or invalidity of Acts 362 and 363 under the Voting Rights Act. We are, however, continuing to gather information and facts on the issues presented. You will note that the Voting Rights Act specifically provides that the failure of the Attorney General to object shall not "bar a subsequent action to enjoin enforcement of such" acts. Should our subsequent investigation persuade us that the acts in fact violate the 15th Amendment, the Voting Rights Act or other applicable federal legislation, we will take appropriate legal steps to raise the issues in court, or, if litigation is initiated by others to participate therein in an appropriate manner.

I want to make clear that no inference of approval or disapproval is to be drawn from the failure of the Attorney General to object within the statutory period. The fact is that we have been unable to reach a decision within the alloted time on the basis of available evidence. I also point out that the acts in question are not effective until January 1, 1971 and, therefore any person interested in or aggrieved by this legislation has an available opportunity to seek judicial relief.

Finally, you may be interested to know that because of the difficulties experienced in this case in trying to carry out his decision-making responsibilities under the Voting Rights Act, the Attorney General has directed me to study the authority of the Department to conduct formal administrative hearings on such submissions so that a decision can be based on a complete record of sworn testimony and documentary exhibits.

Sincerely,

/s/ Jerris Leonard
Assistant Attorney General
Civil Rights Division

DEFENDANTS' EXHIBIT S

Commonwealth of Virginia
Office of
The Attorney General
Richmond

May 14, 1971

The Honorable Lewis A. McMurran, Jr.
Member, House of Delegates
P. O. Box 85
Newport News, Virginia 23607

My dear Mr. McMurran:

I am in receipt of your letter of this date which reads:

> "Due to the possible uncertainty in press releases of the primary date in Newport News, I have been asked if this would affect the primary being held for Clerk of Courts and for the membership on the Democratic Executive Committee. I have expressed the opinion that these primaries would be held on schedule on June 8th. As I am sure you realize, there was no contest with the incumbents in Newport News for nomination by the Democratic Party for the House of Delegates. I would appreciate your opinion on the correctness of the advice I have given to those inquiries."

I am of the opinion that you are correct in your interpretation. As you know, in addition to various offices for which primaries are being conducted in Newport News as well as various other cities, each county in the Commonwealth is, this year, conducting elections for their sheriffs, Commonwealth's attorneys, treasurers and commissioners

of the revenue. See § 24.1-86 of the Code of Virginia (1950), as amended.

The redistricting plans, now in litigation, concern only Senate and House seats for the General Assembly of Virginia. Since the local offices are not interwoven with legislative districts, the primaries for such offices would not be affected by any court decision voiding in whole or in part either of the legislative redistricting plans. Consequently the primaries for the various local offices would be held as scheduled on June 8th, regardless of the outcome of the pending litigation.

With kindest regards, I remain

Sincerely yours,

Andrew P. Miller
Attorney General

DEFENDANTS' EXHIBIT T

House Joint Resolution No. 98
Recess to June 22, 1971.

Resolved by the House of Delegates, the Senate concurring, That when the two houses adjourn today, they stand in recess until Tuesday, June 22, 1971, at 12 o'clock noon, unless reconvened sooner by the Governor or Speaker of the House of Delegates and President of the Senate.

Agreed to by the House of Delegates
May 11, 1971

Agreed to by the Senate
May 11, 1971

Supreme Court of the United States

No. 71-364, 71-373 and 71-553

Joan S. Mahan, Secretary, State Board of Elections, et al.,

Appellants,

v.

Henry E. Howell, Jr., et al.;

City of Virginia Beach,

Appellant,

v.

Henry E. Howell, Jr., et al.; and

William S. Thornton et al.,

Appellants,

v.

Edgar A. Prichard et al.

APPEALS from the United States District Court for the Eastern District of Virginia.

The statements of jurisdiction in these cases

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FOR REMAINDER OF PAGE

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allotted for oral argument.

Mr. Justice Powell took no part in the consideration or decision of these cases.

April 17, 1972

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In the

Supreme Court of the United States

October Term, 1971

Nos. ....., ..., ...

JOAN S. MAHAN, Secretary,
State Board of Elections, et al., *Appellants,*

v.

HENRY E. HOWELL, JR., et al., *Appellees.*

EDGAR A. PRICHARD, Member,
State Board of Elections, et al., *Appellants,*

v.

CLIVE L. DUVAL, 2d, et al., *Appellees.*

EDGAR A. PRICHARD, Member,
State Board of Elections, et al., *Appellants,*

v.

STANFORD E. PARRIS, et al., *Appellees.*

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS

PRELIMINARY STATEMENT

Appellants Joan S. Mahan, Secretary, U. P. Joyner, Jr., Chairman, and Edgar A. Prichard, Member, together constituting the Virginia State Board of Elections, appeal from that portion of the Interlocutory Order of the three-judge

District Court[1] below declaring Virginia's Reapportionment Acts, Chap. 116 of the 1971 Acts of Assembly (House Legislative Districts) and Chap. 120 of the 1971 Acts of Assembly as amended by Chap. 246 (Senate Legislative Districts) violative of the Fourteenth Amendment of the United States Constitution. This appeal is taken insofar as the Court's Order relates to the fragmenting of political jurisdictions in the House plan and the consolidation of single member districts into a multimember district in the Senate plan.

I.

OPINION OF THE COURT BELOW

The opinion of the three-judge District Court for the Eastern District of Virginia in the instant case is as yet unreported and will be found as *Henry E. Howell, Jr., et al.* v. *Joan S. Mahan, Secretary, State Board of Elections, et al.*,

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[1] Civil Action No. 105-71-N, *Howell* v. *Mahan,* was filed on March 3, 1971, application for injunction being made to the District Judge of the Norfolk Division of the United States District Court for the Eastern District of Virginia. Civil Action No. 174-71-R, *DuVal* v. *Prichard,* was filed shortly thereafter on March 8, 1971, application for injunction being made to the District Judge of the Richmond Division. Though not consolidated, the same three-judge court was appointed pursuant to 28 U.S.C. § 2284 to hear the matters; the Court was composed of a judge of the United States Court of Appeals for the Fourth Circuit and the two District Judges to whom application for injunction was made in each case respectively. Subsequently, Civil Action No. 111-71-A, *Parris* v. *Prichard,* was filed on March 22, 1971, application for injunction being made to the District Judge of the Alexandria Division. A separate three-judge court was appointed to hear this matter, composed of the District Judge to whom application for injunction was made as well as the Circuit Judge and a District Judge previously appointed to the other cases.

By order of the Court entered on April 7, 1971, the cases were consolidated "for trial and hearing before the respective three-judge courts" theretofore designated, and the hearing proceeded before a "four-judge" court.

Civil Action No. 105-71-N, as consolidated with *Stanford E. Parris, et al.* v. *Edgar A. Prichard, Member, State Board of Elections, et al.*, Civil Action No. 111-71-A, and *Clive L. DuVal, 2d, et al.*, v. *Edgar A. Prichard, Member, State Board of Elections, et al.*, Civil Action No. 174-71-R, in Appendix pp. 1-22. This single Jurisdictional Statement is filed as allowed by Rule 15 (3) of the Rules of the Supreme Court of the United States, the several cases involving identical or closely related questions.

II.

THE JURISDICTION OF THE COURT

1.

The suits herein were instituted by appellees, Clive L. DuVal, II, et al., and Stanford E. Parris, et al., both seeking to enjoin the redistricting plan promulgated by the General Assembly of Virginia for the House of Delegates, and by appellee Henry E. Howell, Jr., et al., seeking to enjoin the redistricting plan promulgated for the Senate as it pertained to the City of Norfolk, Virginia.

Appellees in the House suits sought declaratory judgment and injunctive relief restraining the enforcement, operation and execution by appellants of Chapter 116 of the 1971 Acts of Assembly [§ 24.1-12.1 of the Code of Virinia (1950), as amended]. Appellee DuVal alleged that the House Districts as created constituted constitutionally impermissible variations of population; constituted invidious discrimination against Northern Virginia as a whole by the failure to allocate an additional delegate to the area; and constituted invidious discrimination by the creation of multimember districts. Appellee Parris raised the same allegations except instead of attacking multimember districts, alleged invidious

discrimination by the division of Fairfax County (allocated ten delegates) into two five-member multimember districts, discussed infra. Jurisdiction was invoked under 42 U.S.C. §§ 1983 and 1988; 28 U.S.C. § 1343 (3) and the Fourteenth Amendment to the Constitution of the United States. A declaratory judgment was sought pursuant to 28 U.S.C. §§ 2201 and 2202 and three-judge District Courts were convened pursuant to 28 U.S.C. §§ 2281 and 2284.

Appellee in the Senate suit sought a declaratory judgment and preliminary and permanent injunctive relief restraining the enforcement, operation and execution by appellants of Chapter 120 of the 1971 Acts of Assembly as amended by Chapter 246 [§ 24.1-14.1 of the Code of Virginia (1950), as amended], as such Act pertained to the City of Norfolk, Virginia. Appellee Howell alleged that the dividing of the City of Norfolk, together with a portion of the City of Virginia Beach, into three single member Senatorial Districts constituted invidious discrimination and prayed for the creation of a multimember district. Jurisdiction was invoked under 42 U.S.C. §§ 1983 and 1988; 28 U.S.C. § 1343 (3), and the Fourteenth and Fifteenth Amendments to the Constitution of the United States; jurisdiction being invoked as to the latter by Amended Complaint under 42 U.S.C. §§ 1973 and 1973 (c). A three-judge District Court was convened pursuant to 28 U.S.C. §§ 2281 and 2284.

This appeal is taken from that part of the interlocutory order of the three-judge District Court (1) declaring the redistricting of the legislative seats of the Virginia House of Delegates violative of the Equal Protection Clause of the Constitution of the United States, insofar as such Order mandates the fragmentation of political jurisdictions within the Commonwealth; (2) declaring the redistricting of the legislative seats of the Virginia Senate violative of the Equal

Protection Clause of the Constitution of the United States, insofar as said Order mandates the consolidation of single member districts creating a three-member multimember district; and (3) enjoins appellants and their successors in office as well as the agents, employees and attorneys thereof, from conducting any elections in any electoral districts except those established and specified by the Court.

. The statute pursuant to which this appeal is brought is 28 U.S.C. § 1253.

2.

The judgment of the three-judge District Court in question is set forth in Appendix pp. 23-25. The date and time of the entry of the judgment sought to be reviewed, is 1 P.M., Eastern Daylight Time, July 2, 1971. The notice of appeal was filed in the United States District Court for the Eastern District of Virginia, Norfolk Division on July 13, 1971, and is set forth in Appendix pp. 49-50.

3.

The United States Code, 28 U.S.C. § 1253, confers jurisdiction of this appeal upon this Court. Such statute provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges."

4.

The following cases sustain the jurisdiction of this Court:

(a) *Davis* v. *Mann,* 377 U.S. 678, 12 L.ed. 2d 609, 84 S.Ct. 1453 (1964);

(b) *St. John* v. *Wisconsin Employment Relations Board*, 340 U.S. 411, 414, 95 L.ed. 386, 71 S.Ct. 375 (1951);

(c) *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed. 2d 506 (1964);

(d) *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.ed. 2d 663 (1962).

5.

This appeal involves the validity of the Virginia Legislative Reapportionment Act for both Houses of the Virginia General Assembly—the Senate and House of Delegates, adopted in 1971 as required by Article II, § 6, of the Virginia Constitution. The text of such Acts are set out verbatim in Appendix pp. 31-43 and due to the length only the citations are set forth herein, as follows:

(a) Chapter 116 of the 1971 Acts of Assembly, p. 198, codified as § 24.1-12.1, Code of Virginia (1950), as amended, Vol. 5, 1971 Cumulative Supplement, p. 74 (Legislative Districts of the House of Delegates).

(b) Chapter 120 of the 1971 Acts of Assembly, p. 219, as amended by Chapter 246, p. 499, codified as § 24.1-14.1, Code of Virginia (1950), as amended, Vol. 5, 1971 Cumulative Supplement, p. 75 (Legislative Districts of the Senate). (Chapter 246 amending Chapter 120 not as yet codified.)

III.

THE QUESTIONS PRESENTED

Did the Court below err in declaring Virginia's Legislative Reapportionment Acts of 1971, Chapter 116 and Chap-

ter 120 as amended by Chapter 246 (Acts of Assembly 1971) violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution insofar as the Court (1) ordered in the Legislative Districts for the House of Delegates fragmentation of political jurisdictions despite the fact that the evidence demonstrated that the districts were as close to mathematical exactness as possible, keeping intact political jurisdictions; (2) ordering as to the Legislative Districts in the Senate, the creation of a three-man multimember district despite the fact that the General Assembly as to that body desired complete single member districts; and (3) enjoined appellants from conducting any elections except in those electoral districts created, established and specified by the Court, despite the fact that the Virginia General Assembly made known its intent to enact any new reapportionment legislation required by any Constitutional requirement decreed by the Court.

IV.

STATEMENT OF THE CASE

This appeal is taken from an Interlocutory Order of the United States District Court for the Eastern District of Virginia entered in the instant cases on July 2, 1971. The appellants, defendants below, are the Secretary of the Virginia State Board of Elections and the members thereof. The appellees, plaintiffs below, are registered and qualified voters of the Commonwealth of Virginia, as are the plaintiff-intervenors. Defendant-intervenors include the cities of Norfolk and Virginia Beach as well as other registered and qualified voters of the Commonwealth. The cases were consolidated for hearing before the four judges who constituted the three three-judge panels. (See fn. 1, *supra.*)

The three separate suits were filed by plaintiffs in the District Court seeking to enjoin the Virginia State Board of Elections from conducting the upcoming elections for membership in the General Assembly of Virginia in the legislative districts created by the General Assembly at its 1971 Extra Session; which session and which action of reapportioning was mandated by the Virginia Constitution of 1971, Article II, Section 6 and the "Schedule" Section 5.[2] The Commonwealth of Virginia has traditionally elected her representatives to the State General Assembly in the odd years; terms for members of the House of Delegates being two years and for the Senate, four years. The entire membership of both Houses of the General Assembly will be elected this

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[2] Revised Constitution of Virginia, Article 2, Section 6. "Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

"Any such reapportionment law shall take effect immediately and not be subject to the limitations contained in Article IV, Section 13, of this Constitution."

Schedule, Section 5. "The General Assembly shall convene at the Capitol at noon on the first Wednesday in January, nineteen hundred seventy-one. It shall enact such laws as may be deemed proper, including those necessary to implement this revised Constitution. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with Article II, Section 6, of this Constitution. The General Assembly shall be vested with all the powers, charged with all the duties, and subject to all the limitations prescribed by this Constitution except that this session shall continue as long as may be necessary; that the salary and allowances of members shall not be limited by Section 46 of the Constitution of 1902 as amended and that the effective date limitation of Section 53 of the Constitution of 1902 as amended shall not be operative."

year in November of 1971, and thus affected by the redistricting.[3]

Pursuant to the requirements of reapportionment, the General Assembly, by Acts approved March 1, 1971,[4] divided the one hundred member House of Delegates into fifty-two districts. The redistricting was a traditional combination of single and multimember districts as well as floater districts. See *Davis* v. *Mann*, 377 U.S. 678, 12 L.ed.2d 609, 84 S.Ct. 1453 (1964). In no case did the plan for the House of Delegates abandon the political jurisdictional lines of the counties and cities and an attempt was made to insure that such lines were maintained and not fragmentized. Although the ten delegates allotted to the County of Fairfax were divided into two five-member multimember districts, the division was made along the congressional redistricting lines previously agreed to, and Fairfax County was not, though divided, fragmentized, i.e., a *portion* of such jurisdiction being placed with any other political jurisdiction.

The deviations from absolute equality of population arrived at by the redistricting of the House ranged from an under-representation of plus 9.6% to an over-representation of minus 6.8%, or a total variance of 16.4%. As noted by the Court, however, the 42nd District, a floater shared by the cities of Chesapeake, Portsmouth and Virginia Beach

[3] "§ 24.1-11. The members of the House of Delegates shall be elected on the Tuesday succeeding the first Monday in November, nineteen hundred seventy-one, and every two years thereafter for a term of two years to begin on the second Wednesday in January succeeding their election."

"§ 24.1-13. Members of the Senate of Virginia to represent each senatorial district of the Commonwealth shall be elected on the Tuesday after the first Monday in November, nineteen hundred seventy-one, and every four years thereafter, for a term of four years, to begin on the second Wednesday in January succeeding their election."

[4] Acts of Assembly, 1971, cc. 116, 120.

would have increased the total variance to as much as 23.6%, depending upon how such floater would be calculated.

In the forty member State Senate, the General Assembly created forty single-member districts. The application of this single-member district policy for the upper house did create some fragmentizing of political jurisdictions in twelve instances out of the one hundred thirty-eight political jurisdictions (counties and cities) in the Commonwealth. The division of the City of Norfolk into three single-member Senatorial Districts, one of which included a portion of the City of Norfolk and a contiguous portion of the City of Virginia Beach, were the districts under attack in the senatorial suit. The three districts, known as the Fifth, Sixth and Seventh Senatorial Districts, had populations of 116,084, 116,103, and 115,959, respectively. Since each, ideally, would have 116,212, the percent deviations from the norm for the three districts were minus 0.1%, minus 0.02%, and minus 0.2%, respectively.

The redistricting of the Senate was done entirely on the basis of the numbers provided by the 1970 Decennial Census. The population of the Norfolk Naval Base, consisting of 36,693 as enumerated by the Bureau of Census at the United States Naval Station, was allocated to the Fifth Senatorial District, where said Station was geographically situated. The evidence introduced showed that approximately 21,000 of these individuals enumerated in the Fifth District did not, in fact, "reside" there, in the legal context of the word, and further that some 9,000 of those 21,000 did not even reside in the Sixth or Seventh Districts as well. It was alleged that the only manner of correcting this alleged inequity would be to create a three-member multimember Senatorial District so that these Naval personnel home-ported at Norfolk could be spread throughout the entire city.

The cases were originally set for consolidated trial in the District Court on May 24, 1971. On May 7, 1971, however, the Attorney General of the United States, acting pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), interposed objections to Virginia's reapportionment plans as related to both the House of Delegates and the Senate. (See Appendix p. 51.) Objections to the House plan were based on five multimember districts in certain metropolitan areas, and objection to the Senate plan was confined to the route of the dividing line between the Fifth and Sixth Senatorial Districts in the City of Norfolk. As a result of these objections, however, the District Court on May 24 directed that the instant cases be continued until June 15, 1971, and further directed the General Assembly, which had remained in session since January of 1971, to act to remove the objections of the Attorney General, stating:

> "(c) That unless on or before June 15, 1971, Virginia has adopted and submitted reapportionment legislation either to the Attorney General of the United States or to the District Court for the District of Columbia for declaratory judgment as provided for in Section 5 of the Voting Rights Act, this Court shall proceed with the trial of these suits and thereafter formulate a plan of reapportionment within the prescription of the Voting Rights Act and resolving the valid objections, if any, of the plaintiffs to the 1971 reapportionment legislation; . . .". (See Appendix pp. 43-46.)

Following this action, this Court on June 7, 1971, handed down its decision in the case of *Whitcomb* v. *Chavis,* 403 U.S. 124, 29 L. ed. 2d 563, 91 S. Ct. 1858 (1971), thus causing removal by the Attorney General of the objections to the House plan. (Appendix p. 53.) The General Assembly then enacted an amendment to the Senate Plan for redraw-

ing the line between the Fifth and Sixth Senatorial Districts to remove the remaining objection,[5] and the instant cases then proceeded to trial on June 16, 1971.

The District Court in its Interlocutory Order declared and adjudged Chapters 116 and 120 (as amended by Chapter 246) of the Acts of Assembly of 1971, generally known as the reapportionment statutes, to be invalid as violative of the Equal Protection Clause of the Constitution of the United States. The District Court went on to devise its own reapportionment plan for the Virginia House of Delegates, as found in its opinion, and the Court further directed that Senatorial Districts Five, Six, and Seven, comprised of the City of Norfolk and a portion of the City of Virginia Beach, be consolidated into a single district from which three state senators are to be elected at large. It was directed that all elections in Virginia, including those scheduled for November 2, 1971, be held pursuant to the Court's plan, the Order stating:

> "2. That members of the Senate and of the House of Delegates of the General Assembly of Virginia be elected from the electoral districts described in said opinion, anything in the existing statutes of the Commonwealth of Virginia to the contrary notwithstanding;
>
> "3. That such of the defendants herein, and their successors in office, as are charged by law with the conduct of said elections, as well as the agents, employees and attorneys thereof, be, and each of them is hereby, enjoined and restrained from conducting any of said elections in any electoral districts except those established and specified in said opinion as aforesaid; . . .".

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[5] Acts of Assembly, 1971, c. 246. (See also Appendix p. 51, letter of David L. Norman, Acting Assistant Attorney General, Civil Rights Division, dated August 13, 1971, approving Chapter 246 [S.B. 125]).

Notice of Appeal was filed by appellants on July 13, 1971. On July 13 and 14, 1971, motions for a stay pending appeal were tendered to a single judge of each of the three-judge panels, the other two judges of each panel being out of the United States on vacation and hence unavailable. Said motions were denied in each instance. On July 19, 1971, application for a stay pending appeal was made to this Court, which application was denied (per Black, J.) on July 27, 1971.

V.

THE QUESTION PRESENTED IS SUBSTANTIAL

For a number of reasons, the action of the Court below, and the question decided is of such a substantial nature as to require plenary consideration by this Court with briefs on the merits and oral argument.

Initially, in this connection, the action of the Court, regardless of the merit in its ruling on the substantive questions presented, was directly contra and violative of past rulings of this Court regarding the well established doctrines of equity and comity, particularly in the area of state legislative reapportionment.

As indicated in the Statement of the Case, the General Assembly as required convened in Extra Session in January of 1971 and adopted a plan of redistricting for its State Senate and House of Delegates which would be applicable to the 1971 general elections; thus insuring equal representative participation in the making of the laws at the earliest moment in the decade of the Seventies.

The Assembly then *recessed* in lieu of adjournment while the plans were presented to the Attorney General pursuant to the Voting Rights Act of 1965, *Perkins* v. *Mathews*, 400 U.S. 379, 27 L. ed. 2d 476, 91 S.Ct. 431, (1971), and while

awaiting the ruling on constitutional issues raised by plaintiffs in the instant suits.

The Attorney General interposed his objections to the plan, and as a result the Court postponed on its own motion, any rulings; the Attorney General then withdrew his objections in light of *Chavis* and the Court on June 16, 1971, heard the constitutional issues raised; its Order of May 24, 1971, being complied with when all objections raised by the Attorney General had been appropriately withdrawn and the Senate plan amended.

Then on July 2, 1971, the lower Court entered its Order, making it perfectly clear that the General Assembly need not have waited patiently in recess to correct any constitutional error decreed by the Court, for the Court drew its own districts and mandated, as indicated in the Statement of the Case, that all elections for the General Assembly must be held from the districts described in the opinion. These matters of "legislative consideration and determination", *Reynolds* v. *Sims,* 377 U.S. 533, 586, 84 S.Ct. 1362, 12 L.ed.2d. 506 (1964), having been judicially decreed, the General Assembly adjourned on July 19, 1971, with the mandate that an appeal be made to this Court requesting correction of the flagrant abuses of judicial discretion constituted by the District Court's action. As this Court has consistently, since the era of *Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962), made it known that, though judicial *determination* of constitutional limitations in redistricting is proper, judicial *relief* should be restrained.

As stated in *Burns* v. *Richardson,* 384 U. S. 73, 84-85, 16 L.ed.2d 376, 86 S.Ct. 1286 (1966):

> "Our decision in *Reynolds* v. *Sims* emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination, and that

judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion *after having had an adequate opportunity to do so.*' 377 U.S., at 586, 12 L. ed. 2d at 541. Until this point is reached, a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond a clear command of the Equal Protection Clause." (Emphasis added.)

In the *Burns* case the lower Court concluded that as a matter of State law, House and Senate apportionment was severable. It sustained the constitutionality of the House plan and ordered that a new Senate plan only be submitted by the legislature to the Court. It was in this context that this Court emphasized that even though the legislature itself was proposing the new Senate plan that the Court should not have limited the legislature to a consideration of apportionment of only one body of the bicameral assembly. A legislature must be free to construct a *total scheme of apportionment best suited in its opinion* to the State's needs.

In the case at bar, the lower court exceeded even the limited restraints placed upon the State of Hawaii in the *Burns* case and mandated that the General Assembly should redistrict no further and that all elections for members of the General Assembly would be held only under those districts devised by the Court.

The action of the lower Court in postponing June primaries for not only members of the General Assembly but local officers not even involved in redistricting, and then stating without any guidelines that Virginia's redistricting plan was invalid, is in direct conflict with the actions of the Alabama Court commended by this Court in *Reynolds* v. *Sims, supra,* wherein it was stated:

> "We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature *had been given an opportunity to remedy the admitted discrepancies* in the State's legislative apportionment scheme, *while initially stating some of its views to provide guidelines for legislative action.*"

The District Court in Virginia's case abandoned its role of rendering judicial determinations, and, without consideration of the propriety of such action, invaded the legislative field, allowed the legislature no opportunity to react to its judicial determination, and ordered into effect its own reapportionment plan. Indeed, though the Alabama District Court in *Reynolds* v. *Sims* ordered into effect a redistricting plan of its own, it did so only as this Court in praise stated:

> "Additionally, the Court below acted with proper judicial restraint, *after the Alabama Legislature had failed to act effectively* in remedying the constitutional deficiencies in the State's legislative apportionment scheme, . . . in prescribing a plan admittedly provisional in purpose so as not to usurp *the primary responsibility for reapportionment which rests with the legislature.*" (Emphasis added.)

Even in the previous Virginia reapportionment case of the Sixties, *Davis* v. *Mann,* 377 U.S. 678, 12 L.ed.2d 609, 84 S.Ct. 1453 (1964), this Court made clear that legislative reapportionment must be done by the General Assembly, stating:

> "*After* the District Court has provided the Virginia legislature with an *adequate opportunity* to enact a valid plan, it can then proceed, should it become necessary,

> to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme. . . . The court below [could] take further action should the Virginia legislature fail to act promptly in remedying the constitutional defects in the State's legislative apportionment plan."

The latest ruling of this Court in the reapportionment field in the case of *Ely* v. *Klahr*, — U.S. — (June 7, 1971), commended and upheld the action of the District Court for the State of Arizona in refraining from interfering with the Arizona legislative plan even though the feared result was that an election would be held under a plan found unconstitutional by the Court. This Court noted and reconfirmed its earlier ruling in *Reynolds* v. *Sims* that:

> "Districting and apportionment are legislative tasks in the first instance, and the Court did not err *in giving the legislature a reasonable time to act* based on the 1970 census figures which the Court felt would be available in the summer of 1971."

Intervention by the federal courts in the form of granting equitable *relief* in cases involving apportionment statutes is analogous with the exercise of federal equity jurisdiction in cases involving the enforcement of state criminal laws and the same result, namely, abstention, should be reached in both instances. We do not contend here that the court below should have abstained on the basis that a state court must first decide questions of state law. Federal jurisdiction, as this Court stated in *Davis* v. *Mann,* is properly invoked and where relevant State constitutional and statutory provisions are plain and unambiguous there is no necessity for federal courts to abstain pending determinations of questions of state law in a state court. However, ambiguity and need for interpretation in a state statute do not constitute the only basis

for resorting to absention. There are numerous cases where abstention has been sanctioned and aproved on grounds of *comity* with the states in order to avoid a result in "needless friction with state policies." *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.ed. 971 (1941). This Court itself has sustained and affirmed abstention on the grounds of comity, stating, for example, in *County of Alleghany* v. *Mashuda Co.*, 360 U.S. 185, 3 L. ed. 2d 1163 (1959):

> "This Court has also upheld an abstention on grounds of comity with the states when the exercise of jurisdiction by the federal court would disrupt a state administrative process, *Burford* v. *Sun Oil Co.*, 319 U.S. 315; *Pennsylvania* v. *Williams*, 294 U.S. 176, interfere with the collection of state taxes, *Toomer* v. *Witsel*, 334 U.S. 385, 392; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, or otherwise create a needless friction by unnecessarily enjoining state officials from executing domestic policies, *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U.S. 341; *Hocks* v. *Hamel*, 288 U.S. 52."

As indicated, we do not ask or contend that the lower Court should abstain from ruling on the *substantive* issues involved. We do contend that the District Court should and must be directed, after judicially determining the substantive issues, to abstain from judicially imposing the type of final relief that it did. The action of the Court in implementing its own plan of redistricting, without giving the General Assembly an opportunity to devise its own substitutes, is in and of itself fundamental error which this Court should reverse.

Moreover, the action of the Court was not wrong only in a theoretical sense, but in fact wrought drastic and adverse change to the plan the General Assembly felt "best suited

to the State's needs." Examples of these unwarranted changes will be discussed throughout the brief, but it should suffice to note at this point one significant example.

The General Assembly felt, as do twenty-five of her sister States[6], that the upper body of Virginia's legislature should have exclusively single-member districts, while the lower body should, while maintaining population equality, guarantee an independent voice to political jurisdictions by using a combination of single, multimember and floater districts.

The District Court, striking down the manner in which the Commonwealth utilized the enumeration by the United States Census Bureau of Naval personnel, ordered consolidation in the Tidewater area of the three single member senatorial districts (Fifth, Sixth and Seventh) comprised of the City of Norfolk and a portion of the City of Virginia Beach. The reason the Court ordered elections from the consolidated district rather than readjusting the three single member districts was:

> "The Court has no survey data as to place of actual residence sufficiently precise to permit creation of three single-member districts."

Though, as will be seen *infra*, the Court erred in holding that census figures could not be utilized, it certainly should not have gone beyond its holding by declaring the relief in the form of a multimember district. It should have ruled and then allowed the General Assembly the opportunity to

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[6] California, Colorado, Connecticut, Delaware, Idaho, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah and Wisconsin, are other States which have exclusive single-member districts in their State Senate. See, *Book of the States,* Apportionment of Legislatures, p. 82.

see if sufficient data could be found to create single member districts within the requirements of the Court's order and most important, within the framework of single member districts for the Senate, which was felt best suited to the needs of representation in the Commonwealth of Virginia. The balance of representation between the two bodies of the General Assembly was thus abolished by the Court's order without any chance given the General Assembly to restore the same.

Manifestly, the Court below not only has set a precedent by departing from principles of equity well established by this Court, it has in deciding the substantive issues involved failed to properly apply determinations of this Court in the reapportionment field.

As recognized since *Reynolds* v. *Sims,* the development of permissible mathematical deviations must be developed "on a case by case basis," 377 U.S. at 578. The extent to which equality may practically be achieved may differ from State to State and from district to district. *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.ed.2d 481 (1964). In *Swann* v. *Adams,* 385 U.S. 440, 17 L.ed.2d 501, 87 S.Ct. 569 (1967), this Court emphasized that simply because a certain percentage variation is upheld in one case, this does not mean that it is authority for all cases to follow:

> ". . . the fact that a [certain percentage] variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case.' " 385 U.S. at 445.

A Court may not therefore either uphold or throw out as unconstitutional mathematical deviations existing in a legislative redistricting plan simply because other cases have, in

considering various mathematical variations, found them constitutional, or even found variations of smaller magnitude to be unconstitutional. The goal to be reached by a legislature is not some preconceived artificial percentage variation. The goal, and the standard which the courts must decide whether the legislature met, is a good faith effort to achieve precise mathematical equality with only the limited population variances which are unavoidable despite this good faith effort or for which justification is shown. *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 22 L.ed.2d 519, 89 S.Ct. 1225 (1969), citing *Reynolds* v. *Sims, supra.*

Yet despite that each and every decision of this Court requires a determination on a case by case basis whether a good faith effort was made to achieve mathematical equality, the Court below ignored the facts in the House plan and struck down the deviations found therein merely because "[p]lans including a variation of approximately that amount have not survived Supreme Court scrutiny [citations omitted]" thus "the statewide range of deviation [calculated with or without the Chesapeake floater] will not pass constitutional muster." *Howell* v. *Mahan,* Appendix p. 3, fn. 1.

This blind adherence to the tyranny of numbers alone was in the face of the only evidence in the case which showed clearly that the deviations in the House plan were "the minimum [possible] above and below the norm, keeping intact political boundaries . . .". (Defendants' Exhibit No. 8.)

The plaintiffs in the House suits put on no evidence showing that smaller deviations in the plan were possible, cf. *Kirkpatrick* v. *Preisler, supra; Swann* v. *Adams, supra.* In fact, they stipulated to Defendants' Exhibit No. 8 and advocated merely a single member districting plan ignoring political boundaries. The Commonwealth would naturally concede that if political boundaries are ignored there is no

reason why a percentage of exactness cannot be achieved. However, it is submitted that tolerance of political jurisdictional lines is justification for some deviation. How much deviation is tolerable has been, as indicated, determined by this Court to be that which is shown unavoidable. The variations in the House plan were shown, by uncontested evidence, unavoidable in the case at bar and the lower Court recognized that dissolving the deviations in the House plan "... *is not achievable at all if the integrity of political subdivisions is mandated.*" App., p. 5.

The policy of the Virginia General Assembly as to the House plan was to keep intact political boundaries. There was no showing that additional or unnecessary population variances among the legislative districts resulted, and therefore there were no variances which the State was mandated to justify. *Kirkpatrick* v. *Preisler, supra*, at 531.

Nor did plaintiffs attempt to show that reliance on political jurisdictional lines was unjustified. Other than an attack on multimember districts *per se*, which attack was rejected by the District Court, the attack on the percentage deviations was solely on the ground that lesser variations had been struck down as unconstitutional. This, as seen, was not a proper method of advocating their alleged unconstitutionality and the Court erred in acceding to this line or argument.

As a matter of law the Commonwealth need not abandon its policy of adherence to political lines, since this Court has recognized such adherence as justifying departure from absolute equality and such recognition is founded as well in previous Virginia cases decided in this Court.

In *Davis* v. *Mann, supra*, at 686-87 the Court recognized that Virginia has a tradition of respecting the integrity of the boundaries of cities and counties in drawing lines and thus districts have always been constructed only of combina-

tions of counties and cities and not by pieces of them, resulting in floterial and multimember districts, both of which have been sustained. As stated in *Reynolds* v. *Sims, supra*:

> "A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in *at least one body* of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering." (12 L. ed. 2d at 538.) (Emphasis added.)

Swann v. *Adams, supra,* again reaffirmed:

> ". . . that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines." (385 U.S. 444.)

Additionally, the argument that the Court's requirements of mathematical exactness in *Kirkpatrick* v. *Preisler* have eliminated maintenance of integrity of political subdivisions as a justification for deviations must be rejected. In *Kirkpatrick* the State's maintenance of political subdivisions was in Congressional redistricting, not State legisla-

tive redistricting, and was for the purpose of inhibiting partisan gerrymandering. It was on this consideration of practical politics that adherence to political boundaries was rejected by the Court. This is a far cry from the desire to insure some voice to political subdivisions as a whole in at least one body of a bicameral State legislature provided basic standards of equality are maintained. The only evidence in the instant case is that such standards were met.

And just recently this Court again reaffirmed that "... a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." *Abate* v. *Mundt,* 403 U.S. 182, 29 L.ed.2d 399, 91 S.Ct. 1904 (June 7, 1971). True, the *Abate* decision was based on the peculiar facts existent in Rockland County, New York, and its towns, the local structure of government under scrutiny. However, this Court has long recognized Virginia's tradition of adhering to political jurisdictional lines and affirmed such tradition in *Davis* v. *Mann, supra,* on the same date that it authorized the according of independent representation to political subdivisions, in at least one body of the legislature. *Reynolds* v. *Sims, supra.* Such tradition can be traced at least back to the requirements of the Virginia Constitution of 1850, Article IV, Section 2, which specified apportionment by county and city and also provided for floterial representation as well as rotation in alternating sessions of representatives in the House of Delegates between two counties with population beyond the representative ratio.[7]

As this Court emphasized in *Reynolds* v. *Sims,* local governments carry out much of the various responsibilities of State government as well as having direct concern in the

[7] See McKay, *Reapportionment: The Law and Politics of Equal Representation,* pp. 438-443, for a summary of Virginia reapportionment.

enactment of numerous local legislative enactments. This alone justifies Virginia's tradition of adherence to political jurisdictions. Moreover, the revised Virginia Constitution now allows for the first time special or local legislation for counties as well as for cities. Revised Constitution of Virginia, Article VII, Section 2. Those provisions now permit counties the constitutional flexibility formerly afforded only to cities in providing services for their citizens.

Under the Court's plan, a situation could arise where the 1602 citizens of Wythe County, Virginia, who were placed in the Sixth Legislative District are opposed to local legislation pending in the General Assembly for their county. They must voice such opposition to the delegates representing 91,620 other persons in the Sixth Legislative District composed of the Counties of Carroll, Floyd and Montgomery and the City of Radford, rather than oppose only their 20,537 fellow citizens of Wythe County.

The Commonwealth is not asserting that population equality must take a back seat to the policy of maintaining political subdivision lines. Such goal certainly cannot justify extreme population variances. The basic standards of equality of population among legislative districts must be maintained. It is submitted, however, that the legislature's plan with its 16.4% overall variance, while according independent voice to political jurisdictions in the House of Delegates, is substantially preferable to the District Court's plan with an overall variance of 10.3%[8] which, in its fragmentation effect

[8] The Court indicates in its conclusion that its under-representation is plus 3.8% and its maximum over-representation is only minus 3.4%. However, the Forty-sixth House Legislative District of the Eastern Shore containing the Counties of Accomack and Northampton was allocated one delegate for a population of 43,446 or a deviation of minus 6.5%. These two counties are a part of the Commonwealth of Virginia and cannot be ignored and must be included in the determination of any variance arrived at in an overall plan of redistricting.

in eleven instances throughout the Commonwealth, has decreed "one man—no vote" for many citizens. In most instances these fragmentized segments contain less than three thousand (3,000) persons and as few as one thousand six hundred two (1602) in the case of Wythe County.

While this Court has emphasized in *Burns* v. *Richardson*, *supra*, and *Maryland Committee* v. *Tawes*, 377 U.S. 656, 12 L.ed.2d 595, 84 S.Ct. 1442 (1964), that a court in reviewing an apportionment plan must consider the scheme as a whole, and cannot sever one House from the other, the District Court did the latter.

The reason for viewing the scheme as a whole was succinctly set forth in *Reynolds* v. *Sims*, *supra*, the Court stating:

> "We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these

and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis." (377 U.S. at 576.)

Yet the District Court ignored completely the balance concept the General Assembly initiated. The balancing of single member districts in one body countering political jurisdictions adhering to population equality in the other was abolished by the District Court's order. For example, the lower court fragmentized Wythe County in the Fourth House District—deviating plus 6.0%—and placed a portion of the county with the Sixth House district—deviating minus 1.5% without ever looking at the Senate Districts containing the Fourth and Sixth House Districts, which Senate Districts, the Thirty-seventh and Thirty-eighth with deviations of minus 2.5% and plus 0.9%, respectively, balanced off the deviations in the House plan. This should not have been ignored.

Likewise the lower court, looking only at the House plan, fragmentized five thousand eight hundred sixty-three (5,863) citizens of Rockingham County in the Sixteenth House District—deviating plus 9.6%—and, ignoring a natural impassable boundary, namely, the Blue Ridge Mountains, placed such portion of the county on the other side of the mountain in the Twenty-sixth House District consisting of Albemarle, Greene, Fluvanna Counties and the City of Charlottesville—deviating minus 3.7%—while at the same time fragmenting a portion of Albemarle County consisting of two thousand ninety-two (2092) citizens into yet a third legislative district.

It is submitted that before the District Court, looking only at the House plan, fragmented the County of Rockingham,

it should have considered the Senate District comprising Rockingham (the Twenty-sixth) which deviated minus 4.37%.

Numerous other examples can be cited, one of which is the court's own redrawing of both the Senate and House seats for the Cities of Norfolk and Virginia Beach. Under the General Assembly's plan, the Senate seats (all single members) for the cities were: one seat for a portion of Virginia Beach, two seats for a portion of Norfolk, and a fourth seat for a portion of Virginia Beach (forty thousand, one hundred ninety-five [40,195] citizens) together with a portion of Norfolk (seventy-five thousand seven hundred sixty-four [75,764] citizens). House seats maintained political boundaries, with a floater being utilized in Virginia Beach. The Court consolidated the two Senate seats in Norfolk with the seat consisting of a portion of Virginia Beach and Norfolk, requiring forty-thousand, one hundred ninety-five (40,195) citizens of Virginia Beach to vote with the total population of Norfolk of three hundred seven thousand, nine hundred fifty-one (307,951). At the same time, the Court fragmented Virginia Beach in the House and instead of balancing the two bodies together by combining in the House a portion of Norfolk with Virginia Beach, it made portions of Virginia Beach vote with the total population of Norfolk in *both* houses of the General Assembly. The Commonwealth points out this aspect of the court's plan, not in the specific interest of either City, but as an example that with the political considerations inherent in such moves the General Assembly and not the court should have been the author of such a decision.

The populations and percentage deviations for both the House and Senate legislative districts are set forth for the Court's convenience in Appendix p. 56 et seq. attached hereto.

The point is that the two plans balancing one another fully justify any deviations existent in the House plan caused by adherence to political jurisdictional lines. An adherence, it is submitted, well justified for the reasons heretofore set out; the recognition previously given such policy by this Court; as well as the recognition given such policy by Lewis, District Judge, in his dissenting apologia for the interests of Fairfax County.

Finally, the decision of the court below enunciates an entirely novel principle of constitutional requirements in the arena of one man—one vote, without any decisional support. The holding of the District Court is that States may not rely upon the 1970 decennial census but must look behind such enumeration to determine where individuals "reside" in the technical legal sense of the word. Whether such a unique requirement is constitutionally mandated must be settled by this Court on the eve of the reapportionment being undertaken by the Commonwealth of Virginia's sister states.

Phrased in another manner, the change ordered by the District Court was based upon the unusual ground—that the manner of enumeration of the 1970 census limits states and localities in choosing between single and multimember legislative districts, necessitating adoption of the latter method of redistricting.

The Senate of Virginia, which consists of forty members, apportioned itself into forty single member districts, relying on enumeration figures of the United States Bureau of the Census. The District Court found that as to the City of Norfolk, which, together with a portion of the adjoining City of Virginia Beach, was divided into three single member districts, the enumeration of Naval personnel (which must be counted—*Davis* v. *Mann, supra,* at 691) was acceptable for Census enumeration purposes, but could only be used by the

Commonwealth in a multidistrict manner. Thus it was ordered that the three single member districts be combined with the three state senators to run at large, or else, one supposes, (except for the Court's mandate that elections must be held from the consolidated area) find where Naval personnel actually own or rent a home in the Commonwealth. This means also a determination of where: college students (counted at their school), institutionalized patients (counted at the institution); military men (counted at their base); actually "reside,"—making proper compensation for necessary adjustments. Such a requirement is fraught with difficulties and possible challenges.

The Census in determining manner and methods of enumeration ignores the traditional meanings of domicile and residence and counts an individual not in those terms but where he "lives," i.e., the place to which such individual has the greatest nexus. Consequently, an individual who, for example, is in State Government in Richmond and lives in an apartment or hotel during the week and commutes home every weekend to his family, home, and place where he votes, is enumerated in Richmond.

The Bureau of the Census decided that the nexus of Naval personnel would be to that place where they were homeported, and consequently enumerated those individuals at such port. The court requires redistricting of such individuals, not where the greatest nexus is but where they "reside" without any evidence whether they actually vote at such residence or can be found there a majority of the time. Yet it cannot be seriously contended that elected officials represent only registered voters. Everyone, be he voter or non-voter, adult or infant, incompetent or sane, felon or not, has the right to equal representation.

Plaintiffs did not advocate a different apportionment base be used by the Commonwealth of Virginia. Such bases

range from the traditional and broadest base of total population as used in the Commonwealth to the most restricted permissible base of registered voters. See *Burns* v. *Richardson, supra.* In between are the citizen population and qualified voter bases.

A census of total population is the broadest base and has been consistently used in this Commonwealth. As pointed out in the Report of the Commission on Constitutional Revision—Commentaries to Article II, Section 6, of the proposed apportionment section of the Revised Constitution—Virginia has not in recent times known any distinct departures from a population basis of representation evident in reapportionment litigation in many States. The Commonwealth has consistently reapportioned herself after each Federal census. In fact, as pointed out, Article II, Section 6, of the Revised Constitution of Virginia, which requires reapportionment in 1971, did not in the original proposal contain the provisions that reapportionment take place in the year 1971 and every ten years thereafter. The reason for this was clear. Section 43 of the old Constitution of Virginia provided that "a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter." Under this provision if the Constitution was revised without the requirement of reapportionment in 1971, reapportionment would not have been required until 1972. The requirement of reapportionment in 1971 was as indicated in order that the General Assembly of Virginia could reapportion itself at the first practical moment after completion of the 1970 decennial data was available and hence utilize such data.

What plaintiffs in fact did attack was not single-member districts; not the apportionment base; not the use of census data, but the decision of the General Assembly of Virginia

to accept the manner in which the United States Bureau of the Census enumerated Naval personnel.

2 U.S.C.A. § 2 (a) requires that each fifth Congress be given a statement "showing the whole number of persons in each State" as ascertained by decennial census of the population.

> "The phrase 'whole number of persons' has been defined historically by the Bureau [of the Census] to include citizens and aliens, persons of voting age and those below voting age, persons who are entitled to vote and those who are not yet entitled to vote, as well as those who have lost the right to vote." *Borough of Bethel Park, et al.* v. *Stans,* 319 F. Supp. 971, 973 (W. D. Pa. 1970).

There can be no doubt that the Commonwealth of Virginia views her legislators as charged with representing the views of all those persons so described who are counted in the district. They are not viewed as representing only those who would be eligible to vote for them. Since the Census enumerates the whole population, the General Assembly was proper in utilizing such data for its reapportionment base.

The latest challenge to the Census Bureau's manner of enumeration was contained in the case of *Borough of Bethel Park, et al.* v. *Stans, supra.* The case is so comprehensive and covers not only the issue raised by plaintiffs regarding enumeration of military personnel but also the compatible issues which arise regarding enumeration of students at colleges and inmates at institutions, all of which are enumerated as residents of the places where their respective military installations, colleges and institutions are located, it is felt therefore appropriate to quote the case at length:

> "Turning to the procedure established by the Director whereby members of the Armed Services serving within

the United States, college students and institutional inmates are enumerated as residents of the places where their respective military installations, colleges and institutions are located, the Court finds that this procedure has a rational basis and represents a proper exercise of discretion. The procedure for enumerating such persons is, in each instance, consistent with the governing principle of the Bureau that persons are to be enumerated at their usual place of residence at the time of the census, that place being the one in which they generally eat, sleep, and work, with persons who are temporarily absent for a few days or weeks from such usual place of being counted as residents of their usual place of abode. Thus, the aforementioned groups of persons are enumerated in the same manner as all other persons, including, for example, a professor who has accepted an appointment to teach at a college for one year but does not know where he will be employed the year thereafter or a businessman who has similarly accepted a one-year appointment at a given location.

"The Bureau has rejected as unsatisfactory criteria for enumeration concepts of 'domicile,' and 'legal residence.' This is not without justification. Each of these terms connoting a legal status are susceptible of varied definitions in different States and also depending upon the purpose for which the terms are used. To utilize any of these terms susceptible of multiple definitions as criteria for enumeration would be to abandon a uniform standard for the same. Moreover, to determine the legal status of a given individual as a domiciliary or legal resident of a particular State and political subdivision within a State, the census takers would be required to inquire of individuals as to their own judgments as to whether they had acquired such a legal status. Many persons would not be in a position to answer satisfactorily such an inquiry.

"The Bureau's governing principle is not without a rational basis. As a matter of the practical administration of the census, the Bureau has found that it can best

avoid missing substantial numbers of persons altogether, on the one hand, and the extensive duplication of persons, on the other, by enumerating persons as of their actual place of residence at the time of the census.

"Plaintiffs contend, however, that members of the Armed Services within the United States, college students, and inmates of institutions should be enumerated as of their home residences. Home residences, it is contended, could be ascertained from the records of the military installations, colleges and institutions. However, the testimony of Dr. Taeuber evidences that the Bureau has a rational basis for using a method of enumeration other than the one suggested by plaintiffs.

"In the case of members of the Armed Forces stationed in the United States, difficulties are presented in enumerating them as of home residences. There are those young men living in their parental home until induction into the Armed Forces and it could be presumed that they will return to their parental home when discharged. There are indications, however, that service in the Armed Forces may lead persons to settle in a different State on discharge. There are, similarly, young men who have left the parental home, who have married and started families. Presumably, they will return to their families, but frequently their service in the Armed Forces means a change of residence for their families, and it is by no means clear that they will return to their previous address. In addition, there are those young men who have left the parental home and who, prior to induction, are living in apartments or rooming houses. To assign them back to these living quarters, now occupied by someone else would raise the disturbing question as to who are the real residents of the living quarters. Finally, persons making a professional career of service in the Armed Forces may not have any real residence other than in the area in which they are serving.

"Plaintiffs contend that those servicemen who have left addresses which are occupied by others on the date

of the census at least could be counted back to the smallest political subdivision from whence they came. But, if one considers a serviceman who has left, for example, plaintiff-Borough of Bethel Park, the inaccuracy of such a designation is quite apparent. Bethel Park is a suburb within the metropolitan area of the City of Pittsburgh. If the serviceman's previous address in Bethel Park is occupied by another when he leaves the Armed Services, it is not unlikely, should he desire to return to his 'home area,' that he would seek residence, for example, in the City of Pittsburgh proper. If he did so, he would become a resident of a congressional district, State legislative districts, and political subdivision different from the ones in which he resided in Bethel Park.

"To enumerate college students as of home residences has been found no less of a problem by the Bureau. When the Bureau followed a procedure of enumerating college students as residents of their parental homes, there was evidence that a number of college students were reported neither by their families nor by the colleges. Also, college students are a transitional group in the population, and many will not return to the addresses of their parents. Again, as in the case of servicemen, some will not return to their home States. Of those who will return to a home State and even a 'home area' within that State there will be, nevertheless, many who acquire residences in congressional and State legislative districts and political subdivisions other than the ones in which they once resided.

"Enumerating inmates of institutions as of home residences presents similar and other difficulties. As in the case of servicemen and college students, many will not return to the same address from whence they came. In the case of penal inmates, many have of record no prior address. Inmates of homes for the aged will assume permanent residences there.

"In each of these cases, the persons in question draw upon the services of the communities in which their

military installations, colleges and institutions are located. The communities in which these persons are residing must plan and develop their public resources to provide for all residents. No abuse of discretion is found in enumerating these persons as inhabitants of these communities rather than as residents of a presumptive home to which many may not be expected to return. Moreover, there is no reason why different criteria should be applied to these persons than are applied to the population at large, many of which may have a status which may be characterized as equally transient on the date of the census.

"Plaintiffs also challenge the methods whereby the Bureau enumerates military servicemen and Government personnel abroad as residents of the States from whence they came and not as residents of any particular address or political subdivision within that State. Enumerating these persons as residents of particular addresses or political subdivisions presents the same problems as previously discussed with regard to military servicemen stationed within the United States and college students. Although military servicemen and Government personnel abroad may not even return to the State from whence they came, unlike military servicemen and Government personnel living within the United States, these persons cannot be enumerated as of any other State. There are presently a large number of members of the Armed Services abroad and the most feasible method of enumerating them as among the population of the United States is to count them back to the States wherein they were residents before entering the Armed Services.

"Plaintiffs further challenge the failure of the bureau to enumerate as residents of either a State or home residence private citizens who are living and working abroad. The short of the matter is that the Bureau has no means of locating these people.

"On review of the various methods of enumeration challenged here, the Court finds that plaintiffs have

failed to establish that these methods are without rational basis. The mere fact that an alternative method of enumeration may exist does not lead to the conclusion that the method employed is arbitrary or any less within the discretion of the Bureau. Nor does the fact that the Bureau has not conducted a statistical survey to determine how many servicemen, college students and institutional inmates in fact return to home States, political subdivisions or addresses compel the conclusion that the methods employed are without rational basis."

The decisions of the census regarding manner of enumeration have been sustained in numerous attacks, one of the earliest being *United States ex rel City of Atlanta, Georgia* v. *Steuart,* 47 F.2nd 979 (D.C. Cir. 1931), continuing with *Duesing* v. *Udall,* 350 F.2d 748 (D.C. Cir. 1965) cert. denied 383 U.S. 912 (1966); *Watson* v. *Gulf Stevedoring Corp.,* 400 F.2d 649 (5th Cir. 1968); *Udall* v. *Washington, Virginia and Maryland Coach Co., Inc.,* 398 F.2d 765 (D.C. Cir. 1968); *Warren Bank* v. *Camp,* 396 F.2d 52 (6th Cir. 1968); and one of the latest attacks being *Quon* v. *Stans,* 309 F.Supp. 604 (N.D. Cal. 1970).

Not only has the manner of enumeration of the Census been upheld, the census as a base measurement of total population and a proper base for reapportionment has never been declared improper. *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969); *Burns* v. *Richardson, supra; Davis* v. *Mann,* 377 U.S. 678 (1964); *Reynolds* v. *Sims, supra; Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L. ed. 2d 481 (1964); and more recently, *Chavis* v. *Whitcomb,* 305 F.Supp. 1364, 307 F.Supp. 1362, where the three-judge court determined that even in the year 1969 the proper basis for reapportionment would be the 1960 decennial census.

Though *Burns* v. *Richardson, supra,* does not require States to use total population figures and approved a base

of reapportionment on a registered voter basis, it very clearly indicated it required such base to be substantially comparable proportionally to a base of total population.

Moreover, as pointed out in the later case of *Preisler* v. *Mayor of City of St. Louis*, 303 F.Supp. 1071 (N.D. Mo. 1969), a base of voter registration or comparable base is not *per se* a constitutionally permissible base for apportionment. It is constitutionally acceptable only if the results substantially reflect the result obtainable by the use of constitutionally permissible base, such as total population. It is submitted that *Preisler* in fact has affirmed that the total population is a constitutionally permissible base, *per se*. The reason for it being constitutional was further stated in *Preisler* wherein the Court went on to state:

> "It cannot be contended seriously that elected officials represent only registered voters. The right to equal representation does not depend upon the extent of a person's political activity or his exercise of political rights."

However, while these cases may be helpful, the *Burns* case especially, would not be applicable to this situation for, as already pointed out, in the Commonwealth of Virginia, Article II, Section 6, of the Revised Virginia Constitution clearly states that in reapportionment:

> "Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the *population* of the district."

Again, in Article VII, Section 5, of the Revised Constitution it is required that redistricting for local political subdivisions be done on the basis of *"population."* See also § 15.1-787 of the Code of Virginia (1950), as amended;

Chapter 201, 1971 Acts of Assembly; § 15.1-571, Code of Virginia (1950), as amended; Chapter 200, 1971 Acts of Assembly. Additionally, Chapter 199 of the 1971 Acts of Assembly, enacting § 15.1-37.5, specifically requires that in redistricting of counties, cities and towns wherein members of the governing body are elected from wards:

> ". . . the governing body of a county, city, or town shall use population figures of the most recent decennial United States census for such county, city, or town."

What better measure of population could there be than the Census? Simply stated, it cannot be contended, in view of the cited authority and general principles of reasonableness, that the Commonwealth of Virginia was arbitrary in relying upon the manner of enumeration used by the Census Bureau in the count of Naval personnel.

Plaintiffs and the District Court would have the Senate of Virginia redistrict "on a rule of thumb" that approximately fifty percent (50%) of the Naval personnel enumerated in Census Tract 000999 occupy housing elsewhere than the Fifth Senatorial District in which they were enumerated.

First, it must be emphasized that the census count is not a sample but a total count. It is clear from the evidence and undisputed by plaintiffs that Census Tract 000999, the Norfolk Naval Base, could not be divided. It was necessary to place all Naval personnel in that one census tract. Any other manner of enumeration by the Commonwealth of Virginia would have involved the numerous decisions made by the Bureau of Census regarding manner and methods of enumerations and would have led to a morass of litigation. The action of the Virginia General Assembly in adopting the census violated no constitutional rights. As indicated time and time again, the legislature of Virginia represents not

voters, it represents all resident individuals. Those individuals enumerated in the census tracts are fully represented and need the representation that any other individual needs regarding urban services, schools, police and fire protection, streets and highways, and even mass transportation.

That these military people had to be counted is undisputed. This was settled in *Davis* v. *Mann,* 84 S.Ct. 1441, 377 U.S. 678. It is submitted that the manner of counting them, i.e., reliance upon the census, in no way constitutes an invidious discrimination nor denies equal representation to any individual. To require that the City of Norfolk be the only locality in the Commonwealth of Virginia to have a multi-member senatorial district was not only an invasion by the judiciary into legislative policy determinations, but further resulted in a destruction of the balance struck between the Houses in Virginia's bicameral legislature.

The Senate, though single member districting the entire State necessitated some fragmentation, was careful to insure that any political subdivision that was fragmented would nonetheless have an effective voice in the legislative district. Though a portion of Virginia Beach was fragmented, it did have 40,195 of its population combined with 75,764 of Norfolk for a single senatorial district of 115,959,—a minus 0.2% deviation. It thus was assured effective responsiveness from its Senator. Now, however, with the Court abolishing the single member districts in Norfolk, the 40,195 individuals are combined with the entire City of Norfolk (307,951) and have no effective voice.

In short the General Assembly in relying upon the Census adopted the method of enumeration used by the Census. Representation of individuals would be on a total population base, with persons, whether citizens of Virginia or not, receiving such representation at the place, determined by the

Census, to be that at which they had the greatest nexus, the place where their daily lives would be most affected by legislative enactments. If the allocation of Naval personnel was proper for census purposes it was, it is submitted, also proper for redistricting purposes. If the concept of "live" used by the Census must be rejected then, prior to any redistricting, each State legislature must determine "residence" not only of Naval personnel, but all military personnel, college students, institutionalized inmates of hospitals, prisons, and mental institutions. The concept of one man-one vote makes no such requirement.

CONCLUSION

Nothing in the Federal Constitution nor past decisions of this Court prevents a State from choosing a legislative structure it deems best suited to the interests, temper and customs of its people provided population equality is maintained. The Virginia General Assembly chose carefully the thesis of its plan—single member districts for its upper chamber and recognition of political jurisdictions for its lower chamber. The plan adopted was one with the least population deviation the thesis would permit. The lower court unjustifiably discarded Virginia's plan both in the upper chamber, on a theory which rings with difficulty and illogic, and in the lower house on a doctrine of tyranny of numbers. Lastly, the District Court in the face of all authority judicially decreed what has always been deemed primarily a task for legislative consideration and determination, locking in for the decade of the seventies a plan devised by four individuals without hearings and substituted for the judgment of one hundred forty individuals all of whom represented constituencies which make the Commonwealth of Virginia what it is—people, not numbers.

It is submitted that in view of the unprecedented actions of the lower Court and the substantial federal questions presented by this appeal, plenary consideration by this Court, including briefs on the merits and oral argument, is required.

Respectfully submitted,

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CERTIFICATE

I, Anthony F. Troy, Assistant Attorney General of the Commonwealth of Virginia, a member of the bar of the Supreme Court of the United States, and one of counsel for appellants, hereby certify that a copy of the foregoing Jurisdictional Statement on Behalf of Appellants was on this the 11th day of September, 1971, mailed to James M. Thomson, Esquire, Plaintiff-Intervenor *pro se* P. O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esquire, Counsel for Plaintiffs Clive L. DuVal, II, et al., 1425 H. Street, N.W., Suite 822, Washington, D.C. 20005; Stanford E. Parris, Esquire, Counsel for Plaintiffs Stanford E. Parris, et al., 4085 Chain Bridge Road, Fairfax, Virginia 22030; The Honorable Andre Evans, Commonwealth's Attorney for Virginia Beach, Counsel for Defendant members of the Electoral Board of the City of Virginia Beach, Princess Anne Station, Virginia Beach, Virginia

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ANTHONY F. TROY
Assistant Attorney General of Virginia

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No. A-83

In The

Supreme Court of the United States

October Term, 1971

CITY OF VIRGINIA BEACH, *Appellant,*

v.

HENRY E. HOWELL, JR., ET AL., *Appellees.*

and

CITY OF VIRGINIA BEACH, *Appellant,*

v.

STANFORD E. PARRIS, ET AL., *Appellees.*

and

CITY OF VIRGINIA BEACH, *Appellant,*

v.

CLIVE L. DuVAL, II, ET AL., *Appellees.*

On Direct Appeal from the United States District Court for the Eastern District of Virginia

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JURISDICTIONAL STATEMENT

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CLIVE L. DuVAL, II, ET AL., *Appellees.*

On Direct Appeal from the United States District Court for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

This is the separate appeal of the City of Virginia Beach[1] from an opinion and interlocutory order entered July 2, 1971, by the United States District Court for the Eastern District

[1] As there are several appellants in this case, the City of Virginia Beach will be referred to by its proper name rather than as "appellant."

of Virginia holding that the reapportionment plan of the General Assembly of Virginia for the election of members of both the Senate and the House of Delegates violates the Equal Protection Clause of the Fourteenth Amendment and substituting for the Virginia plan the court's own reapportionment plan. The City of Virginia Beach submits this Jurisdictional Statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that relief is appropriate for the City of Virginia Beach whether or not this Court grants relief to the other appellants in this case.

OPINION BELOW

The opinion of the District Court, not yet reported, appears in the Joint Appendix at 1 to 22, and the interlocutory order in the Joint Appendix at 23 to 25.[2]

JURISDICTION

The three suits involved in this appeal were instituted in the United States District Court for the Eastern District of Virginia to test the constitutionality of the Acts of the General Assembly of Virginia reapportioning the State, as a result of the 1970 census, into districts for the election of members of the Senate and House of Delegates. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1343 (3) and 2201, and 42 U.S.C. §§ 1983 and 1988. Three-judge courts were convened to hear each of the suits, as required by 28 U.S.C. §§ 2281 and 2284.

The cases were consolidated for trial, and on July 2, 1971, an opinion for the consolidated court was filed and an inter-

[2] The City of Virginia Beach and the Virginia State Board of Elections—Joan S. Mahan, *et al.*, have joined in preparing a Joint Appendix to their separate Jurisdictional Statements.

locutory order entered effectuating the opinion. The City of Virginia Beach sought a stay of this order and a new trial from Judge John A. McKenzie, which were denied on July 13. The order denying the rehearing is printed in the Joint Appendix at 26 to 27. The City of Virginia Beach filed a Notice of Appeal in all three suits in the United States District Court for the Eastern District of Virginia on July 15 which is printed in the Joint Appendix at 47 to 48.

Jurisdiction of this appeal is conferred on the United States Supreme Court by 28 U.S.C. §§ 1253 and 2101(b). *See Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Fortson* v. *Dorsey*, 379 U.S. 433 (1965); *Whitcomb* v. *Chavis*, 39 U.S.L.W. 4666 (U.S. June 7, 1971).

STATUTES INVOLVED

The Virginia reapportionment plan overturned by the District Court is contained in Chapter 116, Acts of Assembly of 1971, setting forth a reapportionment plan for the House of Delegates, and Chapter 120, as amended and re-enacted by Chapter 246, Acts of Assembly of 1971, setting forth a reapportionment plan for the Senate. The 1971 Acts have yet to be published, but these statutes are printed in the Joint Appendix at 27 to 43.

QUESTIONS PRESENTED

(1) Whether the slight deviation from mathematical equality in the General Assembly's reapportionment plan for the House of Delegates is justified to maintain the integrity of political subdivision boundaries in order to give the voters of those political subdivisions an effective voice in at least one body of Virginia's bicameral legislature.

(2) Whether the District Court's reapportionment plan, which submerges large numbers of citizens of Virginia Beach in vast multimember districts for the election of members of both houses of Virginia's bicameral legislature, unconstitutionally dilutes the votes of these citizens and denies to the City of Virginia Beach representation in proportion to its population.

(3) Whether the District Court abused its discretion by ordering a reapportionment plan for the House of Delegates without giving the General Assembly any opportunity to revise its plan and without considering factors important to the determination of fair representation for the City of Virginia Beach.

STATEMENT OF THE CASE

Pursuant to Article II, § 6 of the revised Constitution of Virginia, the General Assembly enacted Chapters 116 and 120, Acts of Assembly of 1971, on March 1, 1971, apportioning the State into electoral districts for the election of members of the House of Delegates and Senate, respectively. Three suits were thereafter instituted in the United States District Court for the Eastern District of Virginia attacking the constitutionality of these Acts. Two suits, *DuVal* v. *Prichard,* filed in the Richmond Division (Civil Action No. 174-71-R), and *Parris* v. *Prichard,* filed in the Alexandria Division (Civil Action No. 111-71-A), alleged that Northern Virginia was underrepresented in the House of Delegates. The third suit, *Howell* v. *Mahan,* filed in the Norfolk Division (Civil Action No. 105-71-N), alleged that 36,693 naval personnel stationed at the Norfolk Naval Station but largely residing elsewhere had improperly been placed in one senatorial district. The three suits were consolidated for trial and set for hearing on May 24, 1971, before four judges, sitting as three Three-Judge District Courts.

The City of Virginia Beach, a municipality with a 1970 population of 172,106 located adjacent to the City of Norfolk, intervened as a party defendant in all three suits pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. Other intervenors included the City of Norfolk as a defendant and several black citizens of the City of Richmond (William S. Thornton, *et al.*) who intervened as plaintiffs on behalf of themselves and all those similarly situated black residents of Virginia.

On May 7, 1971, the United States Attorney General, acting pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(b), objected, on the grounds of dilution of the black minority vote, to the multimember house districts in five urban areas and to the line demarcating the boundary between the 5th and 6th Senatorial Districts in Norfolk. (App. at 51 to 53).

The hearing on May 24 was devoted to arguing the effect of the Attorney General's objection. The court thereupon entered an "Order on First Hearing" (App. 43 to 46) providing: (1) that the trial of the three suits be continued to allow Virginia an opportunity to obtain approval of a reapportionment plan from the United States Attorney General or the United States District Court for the District of Columbia, as provided in the Voting Rights Act; (2) that the primary elections originally set for June 8, 1971, be postponed until September 14, 1971; and (3) that the court would proceed with trial of the three suits and thereafter itself formulate a reapportionment plan resolving valid objections, if any, of the plaintiffs, unless prior to June 15, 1971, Virginia had submitted a reapportionment plan to the United States Attorney General for his approval or had sought a declaratory judgment from the United States District Court for the District of Columbia.

Before the June 15 deadline, this Court handed down its opinion in *Whitcomb* v. *Chavis,* 39 U.S.L.W. 4666 (U.S. June 7, 1971). In the wake of *Chavis,* the Attorney General withdrew his objection to the reapportionment plan for the House of Delegates. (App. at 53). On June 14, 1971, the General Assembly adopted Chapter 246, Acts of Assembly of 1971, which amended Chapter 120 to revise the line between the 5th and 6th Senatorial Districts, thereby eliminating the Attorney General's sole objection to the reapportionment plan for the Senate. (App. at 54 to 55).

The three suits were heard by the consolidated District Court on June 16, 1971. The General Assembly was in session at the time, having postponed adjournment for the sole purpose of remedying any aspects of its plan which might be invalidated by the District Court.[3] But without giving the Assembly an opportunity to devise a plan acceptable to the court or requesting the parties to submit suggested plans, the court on July 2, 1971, filed an opinion and entered an interlocutory order reapportioning Virginia. As affecting the City of Virginia Beach, the General Assembly's reapportionment plan and the modifications made by the District Court are as follows:

Reapportionment Of The House Of Delegates

(a) Under the General Assembly's reapportionment plan for the House of Delegates, the City of Virginia Beach constituted the 40th House District and was allocated three delegates for its population of 172,106, or one delegate per 57,369 citizens. Since one House delegate should ideally represent only 46,485 citizens,[4] the General Assembly created

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[3] The General Assembly did not adjourn until July 8, 1971.

[4] According to the 1970 United States Census, the population of Virginia is 4,648,494. There are 100 seats in the House of Delegates.

a floater delegate for the 42d District comprised of the cities of Virginia Beach, Portsmouth (population 110,963) in the 41st District and Chesapeake (population 89,580) in the 38th District.

(b) The District Court eliminated the 42d House District, transferring its delegate to Northern Virginia. The court then resolved the resulting underrepresentation of the City of Virginia Beach by combining a portion of Virginia Beach with Norfolk. But instead of transferring to the 40th House District the 13,834 Norfolk citizens necessary to give Virginia Beach four delegates, the District Court transferred more than twice as many people—29,136—from Virginia Beach into Norfolk's 39th District to justify Norfolk's seven delegates. Further, under the court's plan, these Virginia Beach citizens would not vote in a single-member district with Norfolk residents; rather they would vote in a multi-member district with the entire 307,951 population of Norfolk.

Reapportionment Of The Senate

(a) Under the reapportionment plan for the Senate as enacted by the General Assembly, Virginia Beach was allotted one senator for 116,528 of its citizens (the 8th Senatorial District). Of the remaining Virginia Beach citizens, 40,195 would vote for one senator with 75,764 citizens of Norfolk, a total of 115,959 (the 7th Senatorial District), and 15,383 would vote for one senator with 7,111 citizens of Nansemond County and the 89,580 citizens of the City of Chesapeake, a total of 112,074 (the 14th Senatorial District). The City of Norfolk was divided into three single-member senatorial districts: the 5th (population 116,084), the 6th (population 116,103) and the 7th (population 115,-959, comprised of 75,764 citizens of Norfolk and 40,195 citizens of Virginia Beach).

(b) The District Court did not alter any senatorial district boundaries. It did, however, consolidate the 5th, 6th and 7th Senatorial Districts into one multimember district, in which three senators are to be elected at-large. This consolidation was to compensate for the exaggerated population of the 5th District caused by counting 36,693 naval personnel at the homeport of their assigned vessels—the Norfolk Naval Station—which is located entirely within the 5th Senatorial District. At least 18,000 of those stationed at the Naval Station actually live outside of the 5th Senatorial District; consolidation of the 5th, 6th and 7th Districts spread the disruptive effect of the naval personnel in the 5th District throughout the three districts. Further, as a result of the consolidation the 40,195 citizens of Virginia Beach who would have voted for one senator with 75,764 citizens of Norfolk under the General Assembly's plan are now to vote for three senators with 307,951 citizens of Norfolk.

The City of Virginia Beach unsuccessfully sought a stay of the District Court's order and a rehearing of the case from Judge John A. MacKenzie. Notice of Appeal to this Court was filed on July 15, 1971. The City of Virginia Beach's application to this Court for a stay of the District Court's order was denied by Mr. Justice Black, acting as Circuit Justice for the Fourth Circuit in Chief Justice Burger's absence, in an opinion dated July 27, 1971.

THE QUESTIONS ARE SUBSTANTIAL

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court stated that the preservation of the integrity of political subdivisions may justify slight deviations from mathematical equality in state reapportionment. Thereafter, in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), the Court stated that this justification

was inapplicable to *congressional* redistricting and that only a good faith effort to achieve absolute mathematical equality would stand constitutional challenge. The Court has yet to decide whether the standard laid down in *Kirkpatrick* and *Wells* applies to *state* reapportionment and, if not, what degree of deviation from exact mathematical equality can be justified to maintain long-standing political boundaries.

In *Whitcomb* v. *Chavis,* 39 U.S.L.W. 4666 (U.S. June 7, 1971), and earlier decisions, the Court has recognized the potential for voter inequality that exists when large multi-member districts are employed in both houses of a bicameral legislature. The plan prepared by the District Court would have a substantial segment of the City of Virginia Beach population vote in such districts, which creates a serious question whether the court's plan is constitutional. Moreover, a significant question exists whether the District Court abused its discretion in this case by its failure to permit anyone to be heard on the merits of the court's plan, to consider key factors crucial to the determination of fair representation for the City of Virginia Beach, and to give the General Assembly of Virginia any opportunity to revise its plan.

The Constitutionality Of The General Assembly's Plan

In its 1971 reapportionment legislation the General Assembly made a good faith effort to assure that one Virginia citizen's vote would be worth as much as another's and to insure a voice for the voters of the political subdivisions of the State in the House of Delegates. A high degree of mathematical equality was achieved. The maximum deviation from the norm for representation in the Senate, where the integrity of political boundaries was not maintained, was 5.2%. The maximum deviation in the House of Delegates, where the integrity of political subdivision was preserved,

was only 9.6%. There has been no showing below that the General Assembly gerrymandered or attempted to protect the seats of incumbent assemblymen. Significantly, the black appellants find more invidious discrimination in the plan devised by the District Court than in that enacted by the Assembly.[5]

This Court has never invalidated on the grounds of population alone a *state* reapportionment plan with a degree of deviation as low as 9.6% and a total variation as low as 16.4%.[6] In *Whitcomb* v. *Chavis,* 39 U.S.L.W. 4666 (U.S. June 7, 1971, the Court disapproved a 14.52% maximum deviation and a 28.20% total variation. In *Swann* v. *Adams,* 385 U.S. 440 (1967), maximum deviations of 18.28% and 15.09% and total variations of 33.55% and 25.65% were declared excessive. The Court held in *Kilgarlin* v. *Hill,* 386 U.S. 120 (1967), that a maximum deviation of 14.84% and total variation of 26.48% must be justified. Only in the area of congressional redistricting has the Court ever held unconstitutional a plan with such a tight adherence to mathematical equality. *See Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969); *Wells* v. *Rockefeller,* 394 U.S. 542 (1969). But in *congressional* redistricting, a State's attempt to avoid fragmenting political subdivisions does not justify any variation from mathematical equality. *Kirkpatrick* v. *Preisler,* 394 U.S. at 533-34.

The District Court in this case, however, ignores the distinction that has been drawn between state and federal re-

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[5] See the "Response to Stay Motions filed by the State of Virginia and City of Virginia Beach," at 3, of William S. Thornton, *et al.,* who refer to themselves as "black appellants."

[6] "Deviation" will be used here to signify percentage deviation from the population norm per delegate (the norm for the Virginia House of Representatives is 46,485 and the Senate norm is 116,212). "Variation" is the total of the maximum deviation above (underrepresentation) and below (overrepresentation) the norm.

apportionment. *Reynolds* explicitly states that "some distinctions may well be made between congressional and state legislative representation" in applying the principle of population equality. 377 U.S. at 578. The Court explained this distinction at some length:

> "Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. *Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting.*" 377 U.S. at 578 (emphasis added).

In addition to the practical consideration that there are many more state than federal representatives and electoral districts, thereby facilitating the use of political subdivision boundaries in state reapportionment, the state-federal distinction is justified by the unique relationship that exists between political subdivisions and state legislatures. This relationship was recognized in *Reynolds*:

> "Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions." 377 U.S. at 580-81.

In Virginia, cities are entirely autonomous political entities that function apart from the counties in which they

are located. The powers exercised by a city in Virginia, as a primary unit of community operation, are established by the General Assembly. A representative in the Assembly represents his constituency in divers matters that affect or relate specifically to the functioning of his particular governmental unit, whether it is a county or city. *See* Va. Const. art. VII, §§ 2 and 3.

This Court cited similar considerations in *Abate* v. *Mundt*, 39 U.S.L.W. 4663 (U.S. June 7, 1971), in approving a plan for local government reapportionment which contained a maximum deviation of 7.1% and total variation of 11.9%. In *Abate* the Court reaffirmed that "a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." 39 U.S.L.W. at 4664.

The District Court gave no consideration to the statements of this Court that slightly greater percentage deviations may be tolerated in state and local reapportionment than in congressional redistricting. Moreover, the court used as the test of the constitutionality of Virginia's reapportionment plan the language found in *Kirkpatrick*, a case dealing with federal redistricting: "a good faith effort to achieve absolute equality." (App. at 22). But even *Kirkpatrick*, and its companion case *Wells*, are not inconsistent with the principle that more freedom from the requirement of mathematical precision may be permissible in state reapportionment than in congressional redistricting. The standard applied in those cases was specifically limited to congressional reapportionment:

> "Therefore, the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable de-

spite a good-faith effort to achieve absolute equality, or for which justification is shown." 394 U.S. at 531.

Further, the District Court's holding in this case is in direct conflict with the holding of the Supreme Court of New Jersey in *Jackman* v. *Bodine,* 53 N.J. 585, 252 A. 2d 209 (1969), *after reargument,* 55 N.J. 371, 262 A. 2d 389 (1970). In *Jackman,* the court was faced with the question whether the degree of population disparity permitted by the New Jersey Constitution was "inherently intolerable" and in violation of the Fourteenth Amendment. The Constitution provided that Assembly districts could not deviate more than 20% from the population norm per delegate. The court found that such a deviation was not inherently bad, recalling its holding in the same case before reargument "that *Kirkpatrick* and *Wells* did not undermine the holding of *Reynolds* that the use of existing political subdivisions may justify a deviation from mathematical equality in state legislative districting." 262 A. 2d at 394. This Court denied certiorari. 400 U.S. 849 (1970).

The Constitutionality Of The District Court's Plan

The District Court has substituted in lieu of the General Assembly's plan its own plan of questionable constitutionality. It would deny to the City of Virginia Beach representation proportionate to its population and effectively disenfranchises thousands of its citizens. There is no doubt that the voters of the City of Virginia Beach had a more effective voice under the General Assembly's plan; there is serious doubt whether the District Court's plan is constitutional.

The plan provides that 29,136 citizens of Virginia Beach vote in the 39th House District with the entire 307,951 population of Norfolk. Political realities insure that the seven at-large delegates from this district would speak in the Gen-

eral Assembly for the 91.4% of their constituents who reside in Norfolk, largely ignoring the 8.6% who live in Virginia Beach. The resulting underrepresentation of Virginia Beach in the House of Delegates is repeated in the Senate—40,195 citizens of Virginia Beach would be required to vote in one multi-member senate district with the entire population of Norfolk. The three at-large senators that would represent this district will speak for the 88.4% of their constituents who reside in Norfolk, not for the 11.6% minority who live in Virginia Beach. Moreover, it is unlikely that a resident of Virginia Beach would ever, as a matter of practical politics, be among the seven delegates and three senators elected from these districts.

Under the court's plan Norfolk, which is entitled to proportionate representation of 6.6 delegates and 2.6 senators in the General Assembly, would be effectively represented by 7 delegates and 3 senators while Virginia Beach, which is entitled to proportionate representation of 3.7 delegates and 1.5 senators, would be represented by only 3 delegates and 1 senator. The cumulative effect of underrepresentation in both houses of Virginia's bicameral legislature infringes upon the Fourteenth Amendment rights of Virginia Beach citizens to an equal voice in the General Assembly.

The clear effect of the District Court's reapportionment plan is to overvalue the votes and representation of those persons living in Norfolk at the expense of the voters of Virginia Beach. The plan operates to minimize and cancel out the voting strength of these voters by submerging a large segment in vast multi-member districts for the election of both senators and delegates. See *Fortson* v. *Dorsey,* 379 U.S. 433, 439 (1965); *Burns* v. *Richardson,* 384 U.S. 73, 88 (1966). This Court has recognized the invidious effect of large multi-member districts used in both houses of a bicameral legislature:

"Such a tendency, we have said, is enhanced when the district is large and elects a substantial proportion of the seats in either house of a bicameral legislature, if it is multi-membered for both houses of the legislature, or if it lacks provision for at-large candidates running from particular geographic subdistricts, as in *Fortson. Burns,* 384 U.S., at 88." *Whitcomb* v. *Chavis,* 39 U.S.L.W. at 4672.

The District Court's Abuse Of Discretion

Even assuming the District Court was correct in holding the Virginia plan unconstitutional, the manner in which the court remedied the apportionment of Virginia involved at least three significant violations of procedural due process.

1.

THE DISTRICT COURT'S PREEMPTION OF THE LEGISLATIVE FUNCTION.

Since the decision of this Court in *Reynolds* and its companion cases, District Courts have consistently referred defective reapportionment plans back to the legislature. *E.g., Chavis* v. *Whitcomb,* 305 F.Supp. 1364, 1400 (S.D. Ind. 1969); *Klahr* v. *Williams,* 303 F.Supp. 224, 226-27 (D. Ariz. 1969); *Hyden* v. *Baker,* 286 F.Supp. 475, 485 (M.D. Tenn. 1968); *Bannister* v. *Davis,* 263 F.Supp. 202, 205 (E.D. La. 1966); *Connor* v. *Johnson,* 256 F.Supp. 962, 968 (S.D. Miss. 1966); *Davis* v. *Synhorst,* 225 F.Supp. 689, 693-94 (S.D. Iowa, 1964). District Courts have taken it upon themselves to reapportion a state only when a state legislature has chosen to ignore the courts' specific directives.

The decision whether the General Assembly's plan contained unjustified deviations from mathematical equality was a judicial decision; the decision how these deviations should be corrected was first and foremost a *political* decision, a

fact recognized by this Court ever since the judiciary first entered the "political thicket" of reapportionment:

> "[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion *after having had an adequate opportunity to do so.*" *Ely* v. *Klahr,* 39 U.S.L.W. 4684, 4686 (U.S. June 7, 1971) (emphasis added), *quoting Reynolds* v. *Sims,* 377 U.S. at 586.

The District Court failed to explain why it, and not the General Assembly, had to redraw the reapportionment plan, stating only that it was "compelled to draft a plan." (App. at 5). The General Assembly was standing by ready to correct any errors in its plan, having postponed its adjournment specifically for this purpose. The General Assembly had indicated its willingness to correct any defects in its plan by redrawing the line between the 5th and 6th Senatorial Districts at the behest of the United States Attorney General. Furthermore, in preparing its reapportionment plan the General Assembly had indicated no defiance of the law as established by this Court: the senate plan passed constitutional muster and the house plan, as even the District Court seemingly concedes (App. at 5), came as close to mathematical perfection as possible while maintaining preexisting political boundary lines.

Speed could not have been a factor. It was indicated at trial that the General Assembly had prepared a new single-member reapportionment plan for the House of Delegates following the District Court's "Order on First Hearing" on May 24. Certainly the Assembly could have drawn a mathematically precise plan under the direction of the court in a very short time considering its political expertise and familiarity with the 1970 population figures.

In the words of *Reynolds,* the General Assembly should have been given "an adequate opportunity" to reapportion the State. No such opportunity was ever afforded the Virginia legislature; in fact, the District Court gave no prior indication of its holding that the Assembly's plan was unconstitutional. In its "Order on First Hearing" (App. at 43 to 46) the court did threaten to formulate a plan, but only if: (1) the General Assembly failed prior to June 15, 1971, to seek approval of a reapportionment plan from the United States Attorney General or the District Court for the District of Columbia; and (2) the court found after trial of the case any validity in the plaintiffs' objections to the General Assembly's plan. The court did not suggest that the plaintiffs' objections were valid. Thus, after the Attorney General withdrew his objection to the House of Delegates' plan, the court's stated grounds for reapportioning Virginia disappeared.

2.

THE DISTRICT COURT'S PLAN WAS CONCEIVED IN A VACUUM.

Not only did the District Court unjustifiably preempt the function of the General Assembly, the court prepared its reapportionment plan without giving the City of Virginia Beach, or anyone else, an opportunity to question its provisions or suggest alternatives. No hearing was held on the merits of the plan, and the court did not request suggested plans from the parties or seek the advice of any impartial experts in the field of reapportionment.[7]

[7] Experts in the field of reapportionment were readily available to the District Court at the University of Virginia Institute of Government, Charlottesville, Virginia.

Even if the District Court was justified in feeling compelled to prepare a reapportionment scheme, due process required some type of hearing before the court mandated so many far reaching changes. A court, unassisted, is certainly in no position to take into consideration the many geographical, economic and political considerations that should play a significant part in the reapportionment process. If a court must reapportion, it should not reapportion blindly as the District Court did in the present case, totally disregarding that the interest of the City of Virginia Beach may not be the same as those of Norfolk.

The transfer of 29,136 Virginia Beach citizens into Norfolk's multimember 39th House District came as a complete surprise. When the court's opinion and order were announced on July 2, the City of Virginia Beach was faced for the first time with the accomplished fact that 29,136 of its citizens had been transferred to Norfolk's multimember house district. This in addition to the fact that 40,195 Virginia Beach citizens had been transferred into Norfolk's multimember senatorial district.

As previously discussed, the cumulative effect of underrepresentation in both houses of the Virginia legislature contravenes the principle of equal representation for equal numbers of people. The procedure followed by the District Court in this case, however, has foreclosed the City of Virginia Beach from being heard on the unconstitutionality, or even the undesirability as a matter of policy, of the court's plan. This Court's insistance that a challenger of multimember districts carry the burden of proving that they unconstitutionally dilute or cancel the voting strength of political elements, *Whitcomb* v. *Chavis,* 39 U.S.L.W. 4666, 4672 (U.S. June 7, 1971), presupposes that the challengers be given an opportunity to meet the burden. But the City of Virginia

Beach has never had this opportunity. Consequently, the City's contention that the District Court's plan is unconstitutional cannot in due process be defeated on this appeal on the grounds that it has not met the requisite burden of proof.

3.

THE DISTRICT COURT'S FAILURE TO CONSIDER IMPORTANT FACTORS.

The District Court also abused its discretion in failing to consider factors crucial to the determination of fair and proportionate representation for the citizens of the City of Virginia Beach.

a. Population Growth

The Court properly recognized that in *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), this Court authorized the use of accurately projected population shifts in state reapportionment (App. at 18), and justified the transfer of a delegate from the Tidewater Area to Northern Virginia on this ground.[8] But in redistricting the City of Virginia Beach, the Court failed to properly apply this principle, making no compensation for the phenomenal growth rate of the City and actually underrepresenting the City to the advantage of Norfolk.

Total population of the City of Virginia Beach increased from 85,218 at the 1960 census to 172,106 at the 1970 census, an overall increase of over 100%. During the same period Norfolk's population has increased only 1%. Current projections indicate that by 1980 the population of Virginia Beach will exceed 275,000 and by 1985 the City will have a

[8] It is somewhat curious that the District Court used Norfolk alone in the comparison of growth rates between Northern Virginia and Tidewater, since the delegate transferred to Northern Virginia represented the City of Portsmouth and the dynamic growth areas of Chesapeake and Virginia Beach, *not* Norfolk.

population in excess of 350,000. The failure to consider this growth trend and the resulting over-representation of Norfolk at the expense of the City of Virginia Beach was clearly erroneous. As this Court stated in *Kirkpatrick*, findings as to population trends must be "applied throughout the State in a systematic, not an *ad hoc* manner." 394 U.S. at 535.

b. Diffusion of Naval Personnel

The District Court also failed to consider its own holding with respect to the necessary diffusion of naval population in reapportioning the House of Delegates. The Court held that the large number of naval personnel, counted in the 5th Senatorial District but residing elsewhere, required consolidation of the 5th, 6th and 7th Senatorial Districts. In reapportioning the House, however, the District Court allocated the entire 5,642 naval population of Little Creek Amphibious Base located in Virginia Beach (Census Tract 400.99) to Norfolk's 39th House District which already contained the 36,693 naval personnel stationed at the Norfolk Naval Station. Over 5,400 of those stationed at the Norfolk Naval Station live in Virginia Beach. Presumably, many of those stationed at the Amphibious Base also live in Virginia Beach. Yet, instead of diffusing the disruptive effect of the naval personnel throughout Norfolk and Virginia Beach and compensating Virginia Beach for the large number of naval residences within its boundaries, the District Court improperly concentrated all homeported naval personnel in the area in Norfolk's House District.

c. Readily Available Alternatives

There were also readily available alternatives, apparently not considered by the District Court, which would have assured the City of Virginia Beach representation in propor-

tion to its population without upsetting the mathematical equality of the court's plan.[9]

Single member house and senate districts drawn to encompass voters from both jurisdictions would have assured that the representatives elected from these districts would be responsive to the interests of the voters of Virginia Beach as well as the voters of Norfolk. The simplest approach would have been to include 17,349 citizens of Norfolk in Virginia Beach's 40th House District while transferring to Virginia Beach one of the seven delegates from Norfolk's 39th House District. This would balance the representation between the two cities—Norfolk would be overrepresented in the Senate and underrepresented in the House while Virginia Beach's representation would be the reverse. In *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964), this Court pointed out that "apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house."

The errors in the District Court's plan that resulted either from the court's inexperience in political matters or from the court's failure to consider and analyze the facts can not be excused on the ground that the District Court had to operate quickly. The discriminatory effect of the court's plan on the City of Virginia Beach will continue for the next *ten* years.[10] The court could have given itself sufficient time by further postponing the election or permitting the 1971 election to take place under the General Assembly's plan. The court could have given the General Assembly one week (the court

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[9] The District Court failed to achieve the mathematical perfection it sought, even disregarding the integrity of political subdivisions. The plan devised by the District Court decreased maximum deviation in the House of Delegates only from 9.6% to 6.5% and total deviation from 16.4% to 10.3%.

[10] Article II, § 6 of the Virginia Constitution provides for reapportionment of the State in 1971 and every ten years thereafter.

took two) to enact an acceptable plan. Further, the under-representation of the citizens of Virginia Beach might very well have been avoided had the court simply held a hearing on the merits of its plan. In *Whitcomb* v. *Chavis*, 39 U.S.L.W. 4666, 4677 (U.S. June 7, 1971), where the lower court had similarly erred in "broadly brushing aside state apportionment policy" without adequately scrutinizing the case or justifying its holding, this Court remanded for reconsideration.

CONCLUSION

The City of Virginia Beach respectfully requests that the Court note probable jurisdiction and hear full argument on the substantial questions presented herein, or in the alternative, remand the case to the District Court with directions to consider fully all the factors present in this case and permit the City of Virginia Beach an opportunity to be heard on the constitutionality of the District Court's plan.

Respectfully submitted,

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Dated: September 13, 1971

CERTIFICATE OF SERVICE

I, Harry Frazier, III, counsel for the City of Virginia Beach and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Jurisdictional Statement, together with three copies of the Joint Appendix, in the United States Mails, first class postage prepaid, this 13th day of September, 1971, addressed to The Honorable Andrew P. Miller, Supreme Court Building, Richmond, Virginia 23219; James M. Thomson, Esquire, P. O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esquire, 1425 H Street, N. W., Suite 822, Washington, D. C. 20005; Stanford E. Parris, Esquire, 4085 Chain Bridge Road, Fairfax, Virginia 22030; C. Stanley Dees, Esquire, 314 North Pitt Street, Alexandria, Virginia 22314; Robert L. Weinberg, Esquire, 1000 Hill Building, Washington, D. C. 20006; The Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, P. O. Box 1531, Norfolk, Virginia 23501; The Honorable R. F. Horan, Jr., Commonwealth's Attorney of Fairfax County, Fairfax, Virginia 22030; The Honorable Gordon B. Tayloe, Jr., Assistant City Attorney, Norfolk, Virginia, 908 City Hall Building, Norfolk, Virginia 23501; The Honorable Henry E. Howell, Jr., 808 Maritime Tower, Norfolk, Virginia 23510; The Honorable Peter K. Babalas, 210 Rotunda Building, Norfolk, Virginia 23510; The Honorable Henry L. Marsh, III, Hill, Tucker and Marsh, 214 East Clay Street, Richmond, Virginia 23219; Armand Derfner, Esquire, 520 Woodward Building, 733 15th Street, N. W., Washington, D. C. 20005; Benjamin W. Dulany, Esquire, 822 Southern Building, Washington, D. C.; C. V. Spratley, Jr., Esquire, P. O. Box 575, Newport News, Virginia 23607; and The

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71-373

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1971

No. A-83 71-373

CITY OF VIRGINIA BEACH, *Appellant,*	v.	HENRY E. HOWELL, JR., ET AL., *Appellees.*
CITY OF VIRGINIA BEACH, *Appellant,*	v.	STANFORD E. PARRIS, ET AL., *Appellees.*
CITY OF VIRGINIA BEACH, *Appellant,*	v.	CLIVE L. DUVAL, II, ET AL., *Appellees.*

No. A-84 71-364

JOAN S. MAHAN, ET AL., *Appellants,*	v.	HENRY E. HOWELL, JR., ET AL., *Appellees.*
EDGAR A. PRICHARD, ET AL., *Appellants,*	v.	CLIVE L. DUVAL, II, ET AL., *Appellees.*
EDGAR A. PRICHARD, ET AL., *Appellants,*	v.	STANFORD E. PARRIS, ET AL., *Appellees.*

Joint Appendix of the City of Virginia Beach and Virginia State Board of Elections—Joan S. Mahan, et al.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Civil Action No. 105-71-N

Henry E. Howell, Jr., et al.,

v.

Joan S. Mahan, et al.

Alexandria Division

Civil Action No. 111-71-A

Stanford E. Parris, et al.,

v.

Edgar A. Prichard, et al.

Richmond Division

Civil Action No. 174-71-R

Clive L. DuVal, II, et al.,

v.

Edgar A. Prichard, et al.

OPINION

Albert V. Bryan, Circuit Judge:

The Constitution of Virginia, Article II, Section 6 directs, inter alia, that "members of the Senate and of the House of Delegates shall be elected from electoral districts

established by the General Assembly [the legislature]" and that "[e]very election district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." Article IV provides for a Senate of not more than 40 and not less than 33 members, and a House of Delegates of not more than 100 and not less than 90. Reapportionment of the Commonwealth into districts was required for 1971 and every ten years thereafter.

Validity of the General Assembly's present effort to meet this obligation is at stake in these three suits. By an Act approved March 1, 1971, Chapter 116, Acts of Assembly, Code § 24.1-12.1, the State was divided into 52 districts for the election of 100 members of the House of Delegates. This enactment is here attacked by the plaintiffs in DuVal, et al. v. Prichard, et al. and Parris, et al. v. Prichard, et al., as well as by William S. Thornton, et al., plaintiff-intervenors in the DuVal case, chiefly as failing to provide "representation in proportion to the population of the district." Aside from this common ground, *DuVal* strikes at the provision for multi-member districts, while *Parris* complains of the division of Fairfax County into two districts of five delegates each, rather than its continuance as a whole district with 10 delegates. The *Thornton* plaintiffs object that black residents of several metropolitan areas are denied full voting strength by multi-member districts.

By another Act approved March 1, 1971, Chapter 120, Acts of Assembly Code § 24.1-14.1 as amended by an Act approved June 14, 1971, Chapter 246, Acts of Assembly, the State was partitioned into 40 districts for election of 40 senators, one from each district. This Act is not questioned by the *DuVal* and *Parris* original or intervening plaintiffs.

But Howell, et al. v. Mahan, et al. condemns it as breaching the Virginia Constitution's demand for equal district representation. In this legislation the City of Norfolk has been split into three districts: 5th, 6th and 7th, the last supplemented by a slice of abutting City of Virginia Beach. Specifically, the *Howell* protest is that as drawn the districts are unbalanced (1) by the allocation of servicemen aboard Navy ships "home-ported" in Norfolk, (2) by including Government reservations which do not permit political campaigns thereon, and (3) in circumscribing the Negro electors principally into one district.

Obviously, in each of these three suits the protestations, if sustained, would establish contraventions of the Equal Protection Clause of the Fourteenth Amendment and transgress the now familiar doctrine of "one man, one vote." Kirkpatrick v. Preisler, 394 US 526, 530 (1969); Wells v. Rockefeller, 394 US 542, 546 (1969); Reynolds v. Sims, 377 US 533, 568 (1964). Our search, therefore, is a factual scrutiny of the reapportionment Acts for such deviations, if any, as may be impermissible under the State and Federal constitutions.

With the population count of Virginia by the 1970 decennial census amounting to 4,648,494, each of the 100 members of the House of Delegates should represent approximately 46,485 persons. Nevertheless, we find throughout the State numerous instances of delegate representation which have not been so evened in the reapportionment statutes. Seemingly, the variances are traceable to the desire of the General Assembly to maintain the integrity of traditional county and city boundaries. Senatorial assignments have uniformly been restricted to one senator per district. The only attack on the senatorial plan is the division of the City of Norfolk into three districts.

A foremost example of disparateness is the 16th district. It is composed of Rockingham, Page and Shenandoah counties and the City of Harrisonburg, with a population of 101,928, and allotted two delegates—one for each 50,964—thus exceeding the norm of 46,485, and under-represented by 9.6%. On the contrary, district 12 comprising Campbell County has a delegate for 43,319 and so is over-represented by 6.8%, making the total disparity 16.4%.[1]

This variation is sufficient to condemn the plan. In reapportionment cases the burden is on the State to justify deviations from parity by "legitimate considerations incident to the effectuation of a rational state policy." Reynolds v. Sims, supra, 377 US 533, 579 (1964); see Swann v. Adams, 385 US 440, 444 (1967). The State has proved no governmental necessity for strictly adhering to political subdivision lines. Further, the General Assembly has not consistently implemented its asserted policy, as witness the division of Fairfax County.

These unconstitutional disparities can be remedied in most instances by merely shifting district lines, leaving undisturbed the numerical allocation of delegates to districts.

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[1] The Court notes that this range of deviation may exceed 16.4%. The Forty-second District, a floater shared by the cities of Chesapeake, Portsmouth and Virginia Beach, together with Chesapeake's two-delegate complement in the Thirty-eighth District, causes an over-representation of Chesapeake voters by 14% according to the calculation of the *DuVal* plaintiffs. The statewide range of deviation would therefore be 23.6%. Plans including a variation of approximately that amount have not survived Supreme Court scrutiny. Whitcomb v. Chavis, ... U.S. ....., 39 LW 4666 (June 7, 1971); Swann v. Adams, 385 U.S. 440 (1967). The Supreme Court has indicated approval of the DuVal method of computing percentage deviations for floterial districts in Kilgarlin v. Hill, 386 U.S. 120, 124 (1967). The State argues that the deviation for Chesapeake is only +.2%, the average deviation for all areas which share the floater delegate. Under either mode of calculation, we find that the statewide range of deviation will not pass constitutional muster.

It is an adequate remedy whenever malapportionment arises from over-population in a district which is contiguous to one or more under-populated districts. We have endeavored to pursue this adjustment wherever feasible because it fosters the clear preference of the Assembly to adopt recognized political subdivision lines in apportioning delegates. An exception, however, to the effectiveness of this remedial device necessarily arises when a cluster of districts is over-represented, and there is no contiguous district which has an off-setting under-representation. The drafting of district lines to dissolve this regional concentration of disparity is formidable; it is not achievable at all if the integrity of political subdivisions is mandated.

To accomplish constitutional reapportionment throughout Virginia we have been compelled to draft a plan consisting of the Assembly's layout with necessary amendments. The plan of reapportionment now drawn by the court follows the Assembly's district numbers.

As to each district there is given the number of delegates, the total population, the composition by political subdivisions of present boundaries and, where enlarged or reduced, the percentage of the increase or decrease. The source of every change is either existing political subdivisions or the descriptions provided by Enumeration Districts, (ED) Block Groups (BG) or Census Tracts (CT) provided by the United States Bureau of the Census for 1970. The number of persons in the district exceeding or falling beneath the norm of 46,485 is expressed in percentages, with a plus (+) percentage indicating an excess in population and a minus (—) showing a population deficiency; consequently, a plus population percentage reveals an under-representation, with a minus sign pointing to an over-representation. The plan is this:

Districts for the Virginia House of Delegates shall be constituted as follows:

1. First: 2 delegates; existing population 100,722—a deviation of +8.3%—consisting of Dickenson, Lee, Wise and Scott counties with the town of Norton. This district shall be altered by a transfer of Enumeration Districts 14 (pop. 1,676), 19 (pop. 1,004), 23 (pop. 986), 24 (pop. 1,309) and 25 (pop. 1,088) in Scott County to the contiguous Second District, reducing the total population of the First to 94,659 (100,722 less 6,063) creating a deviation of +1.8%.

2. Second: 2 delegates; existing population 87,041—a a deviation of —6.4%—consisting of the City of Bristol and the counties of Smyth and Washington. This district shall gain ED's 14, 19, 23, 24 and 25 from Scott County, contiguous to Washington County, bringing the total population to 93,104 (87,041 plus 6,063) leaving a deviation of +0.14% per seat.

3. Third: 2 delegates; existing population 96,420—a deviation of +3.7%—consisting of Russell, Tazewell and Buchanan counties. This district shall remain unchanged.

4. Fourth: 1 delegate; existing population 49,279—a deviation of +6.0%—consisting of Wythe, Grayson and Bland counties along with the City of Galax. This district will lose ED's 2 (pop. 331) and 23 (pop. 1,271) from Wythe County to be added to the contiguous Sixth District, reducing the total population of the Fourth to 47,677, with a resulting deviation of +2.56%.

5. Fifth: 1 delegate; existing population 49,829—a deviation of +7.2%—made up of Craig, Giles and Pulaski counties. This district shall lose all of Craig County (pop.

3,524) to the Eighth District, leaving the Fifth with a total population of 46,305 (49,829 less 3,524), a deviation of —0.39%.

6. Sixth: 2 delegates; existing population 91,620—a deviation of —1.5%—consisting of Carroll, Floyd and Montgomery counties and the City of Radford. This district shall gain ED's 2 and 23 from contiguous Wythe County of the Fourth District, leaving a total population in the Sixth of 93,222 (91,620 plus 1,602) producing a deviation of +0.27%.

7. Seventh: 2 delegates; existing population 92,115—a deviation of —0.9%—consisting of the City of Roanoke. This district shall remain unaltered.

8. Eighth: 2 delegates; existing population 89,321—a deviation of —3.9%—consisting of Roanoke County and the City of Salem. To this district shall be added contiguous Craig County from the Fifth, leaving the Eighth with an aggregate population of 92,845 (89,321 plus 3,524), which produces a deviation of —0.14%.

9. Ninth: 2 delegates; existing population 91,561—a deviation of ....1.5%—consisting of Franklin, Rockbridge and Bedford counties along with the cities of Bedford, Lexington and Buena Vista. This district shall remain unchanged.

10. Tenth: 1 delegate; existing population 46,215—a deviation of —0.6%—consisting of the counties of Alleghany and Botetourt and the cities of Clifton Forge and Covington. This district will remain unchanged.

11. Eleventh: 2 delegates; existing population 91,857—a deviation of —4.2%—consisting of the city of Lynchburg and the counties of Amherst and Nelson. The district

shall gain ED's 26 (pop. 1,070) and 31 (pop. 1,022) from Albemarle County of the contiguous Twenty-sixth District, bringing the population of the Eleventh up to 93,949 (91,857 plus 2,092), leaving a deviation of +1.0%.

12. Twelfth: 1 delegate; existing population 43,319—a deviation of —6.8%—consisting of only Campbell County. This district shall be augmented in size by the addition of ED's 8 (pop. 678), 9 (pop. 836), 10 (pop. 260) and 12 (pop. 990) from contiguous Charlotte County of the Twenty-eighth District, bringing up the total population of the Twelfth to 46,083 (43,319 plus 2,764) resulting in a deviation of —0.9%.

13. Thirteenth: 3 delegates; existing population 144,625 —a deviation of +3.7%—consisting of the counties of Patrick, Henry, Pittsylvania and the City of Martinsville. This district shall be left unchanged.

14. Fourteenth: 1 delegate; existing population 46,391 —a deviation of —0.2%—consisting of the City of Danville. It will not be altered.

15. Fifteenth: 2 delegates; existing population 93,152— a deviation of +0.2%—consisting of the cities of Staunton and Waynesboro and the counties of Augusta, Highland and Bath. This district will remain unchanged.

16. Sixteenth: 2 delegates; existing population 101,928 —a deviation of +9.6%consisting of Rockingham, Page and Shenandoah counties, plus the City of Harrisonburg. This district shall be reduced in size by excising the easternmost Enumeration Districts from Rockingham County, adding them to the adjacent Twenty-sixth District, where Albemarle and Greene Counties border on Rockingham County. The area removed from the Sixteenth will include

ED's 20 (pop. 1,158), 23 (pop. 1,223), 24 (pop. 1,441), 27 (pop. 1,143), 28 (pop. 898) and 29 (pop. 0—but must be included to provide *contiguity*). This will decrease the population of the Sixteenth to 96,065 (101,928 less 5,863), reducing the deviation to +3.30%.

17. Seventeenth: 2 delegates; existing population 93,314 —a deviation of +0.4%—consisting of the counties of Frederick, Clarke, Fauquier and Warren, including also the City of Winchester. No change is to be made here.

18. Eighteenth: 5 delegates; existing population 246,509 —a deviation of +6.1%—consisting of the cities of Fairfax and Falls Church and that portion of Fairfax County which lies in the Tenth Congressional District as delineated in Virginia Code, § 24.1-4.1. This district shall be changed by deleting the City of Fairfax and Fairfax County CT's 4030 (pop. 2,825) and 4031 (pop. 4,298), but adding Fairfax County CT's 4035 (pop. 6,511) and 4036 (pop. 3,396). This results in an adjusted total population of the Eighteenth of 227,323, which produces a deviation of —2.3%.

19. Nineteenth: Formerly 5 delegates—now changed to 6; existing population 241,254—a deviation of +3.8%—consisting of that part of Fairfax County situated in the Eighth Congressional District as set forth in Virginia Code § 24.1-4.1, supra. This district shall be altered to include CT's 9001 (pop. 1,595) and 9002 (pop. 8,008) along with ED's 63 (pop. 631), 71 (pop. 1,255) and 72 (pop. 956) from CT 9006, all from Prince William County, together with Fairfax City (21,970) and that portion of Fairfax County Designated as the Eighth Congressional District, supra, less CT's 4035 and 4036, but adding CT's 4030 and 4031. The resulting district will then have a total population of 272, 885, producing a deviation of —2.2%.

20. Twentieth: 3 delegates; existing population 148,252—a deviation of +6.3%—consisting of the counties of Loudoun and Prince William. This district will be altered by deleting CT's 9001, 9002 and ED's 63, 71 and 72 from CT 9006, all from Prince William County to be assigned to the Nineteenth. This change will leave the total population of the Twentieth at 135, 807, producing a deviation of —2.6%.

21. Twenty-first: 2 delegates; existing population 110,938—a deviation of +2.3% (calculated with reference to the floater described as District Twenty-three)—consisting of the City of Alexandria. This will not be changed.

22. Twenty-second: 3 delegates; exising population 174,284—a deviation of +2.3% (calculated with reference to the floater described as District Twenty-three)—consisting of the County of Arlington. This district will remain unaltered.

23. Twenty-third: 1 delegate; existing population 285,222—a deviation of +2.3% (calculated with reference to Districts Twenty-one and Twenty-two)—this is a floater district consisting of the City of Alexandria and the County of Arlington. Nothing will be changed here.[2]

24. Twenty-fourth: 2 delegates; existing population 90,441—a deviation of —2.7%—consisting of the counties of Hanover, Caroline and Stafford, plus the City of Fredericksburg. No adjustment has been made here.

25. Twenty-fifth: 1 delegate; existing population 45,847—a deivation of —1.4%—consisting of the counties of

[2] See note 1, supra, regarding computation of Chesapeake under the alternative theory espoused in *DuVal*. Applying this theory to the floater here results in a deviation of —0.1% for Alexandria and a deviation of +3.9% for Arlington.

Culpeper, Rappahannock, Madison and Orange. No change will occur here.

26. Twenty-sixth: 2 delegates; existing population 89,529—a deviation of —3.7%—consisting of the counties of Albemarle, Greene and Fluvanna and the City of Charlottesville. This district will be altered in order to adjust the imbalances present in the adjoining Sixteenth and Eleventh districts, discussed above. Added to the Twenty-sixth will be ED's 20, 23, 24, 27, 28 and 29 from adjacent Rockingham County (Sixteenth) on the west; lost to the contiguous Nelson County (Eleventh) on the south will be ED's 26 (pop. 1,070) and 31 (pop. 1,022) from Albemarle County. These changes will produce a total population in the Twenty-sixth of 93,300, with a resulting deviation of +0.35%.

27. Twenty-seventh: 1 delegate; existing population 48,531—a deviation of +4.4%—consisting of the counties of Appomattox, Buckingham, Cumberland, Amelia and Prince Edward. This district shall lose ED's 1 (pop. 726), 2 (pop. 1,038) and 3 (pop. 532) from Amelia County to the adjacent Thirty-first District, reducing the population of the Twenty-seventh to 46,235 (48,531 less 2,296), producing a deviation of —0.54%.

28. Twenty-eighth: 1 delegate; existing population 48,516—a deviation of +4.4%—consisting of the counties of Halifax and Charlotte along with the City of South Boston. This district will be diminished in population by removing ED's 8 (pop. 678), 9 (pop. 836), 10 (pop. 260) and 12 (pop. 990) in Charlotte County to be added to contiguous Campbell County in the Twelfth. The change will reduce the population of the Twenty-eighth to 45,752 (48,516 less 2,764), producing a deviation of —1.6%.

29. Twenty-ninth: 1 delegate; existing population 45
598—a deviation of —1.9%—consisting of the counties
Brunswick and Mecklenburg. No alteration will be ma
here.

30. Thirtieth: 1 delegate, existing population 45,1
(includes 9,000 from annexed area)—a deviation
—3.0%—consisting of the City of Petersburg. This di
trict shall keep its present delineation.

31. Thirty-first: 1 delegate; existing population 46,9
(includes loss from annexation)—a deviation of +1.1%-
consisting of the counties of Dinwiddie, Lunenburg a
Nottoway. This district shall be altered in order to redu
inbalances in the adjacent Twenty-seventh and Forty-fif
districts. The Thirty-first will lose ED's 16 (pop. 489
17 (pop. 1,392) and 18 (pop. 841) of Dinwiddie Coun
to the contiguous Forty-fifth District, but the Thirty-fir
District will be augmented by the addition of ED's 1, 2 a
3 from Amelia County (Twenty-seventh), as discuss
above. These changes will leave the Thirty-first with
total population of 46,552 (46,978 less 2,722, plus 2,29
with a resulting deviation of +0.14%.

32. Thirty-second: 1 delegate; existing population 48
193—a deviation of +3.7%—consisting of the counti
of Louisia, Spottsylvania [sic], Goochland and Powhata
No change will occur here.

33. Thirty-third: 5 delegates; existing population 249
621—a deviation of —3.4% (calculated with reference
the floater described as District Thirty-five)—consistin
of the City of Richmond. This will not be altered.

34. Thirty-fourth: 3 delegates; existing populati
154,364—a deviation of —3.4% (calculated with referen

to the floater described as District Thirty-five)—consisting of the County of Henrico. No change will be effected here.

35. Thirty-fifth: 1 delegate; existing population 403,985 —a deviation of —3.4% (calculated with reference to Districts Thirty-four and Thirty-five)—this is a floater district consisting of the City of Richmond and the County of Henrico. This district will remain unaltered.[3]

36. Thirty-sixth: 2 delegates; existing population 91,-952—a deviation of —1.1%—consisting of the County of Chesterfield and the City of Colonial Heights. This district will be left unchanged.

37. Thirty-seventh: 1 delegate; existing population 47,-146—a deviation of +1.4%—consisting of the City of Hopewell and the County of Prince George excluding those portions encompassed in the Thirtieth District. No change will be effected here.

38. Thirty-eighth: Formerly, 2 delegates; existing population 89,580—a deviation of +0.2% (calculated with reference to the floater comprising the Forty-second District, discussed below)—consisting of the City of Chesapeake. The Thirty-eighth District will be altered in order to evenly distribute the imbalance in this section of the State resulting from the transfer of one delegate to Northern Virginia as discussed above. The new Thirty-eighth will be allotted 4 delegates (thereby eliminating the Forty-second) and will encompass only the City of Chesapeake, excepting CT's 212 (pop. 2,316), 213.01 (pop. 1,887) and 215.01 (pop. 3,396) and the City of Portsmouth (pop. 110,-

[3] See note 1, supra. Under the Duval computation, Richmond City and Henrico County have population deviations of —4.4% and —1.8%, respectively.

963) giving a total population of 192,944 which is a deviation of +3.77%.

39. Thirty-ninth: 7 delegates; existing population 307,951—a deviation of —5.4%—consisting of the City of Norfolk. This district shall gain CT's 400 (pop. 2,087), 400.99 (pop. 5,642), 402 (pop. 2,649), 404 (pop. 3,877), 406 (pop. 1,247), 408 (pop. 7,793) and 412 (pop. 5,841) from the City of Virginia Beach. This will give the Thirty-ninth a population of 337,087 (307,951 plus 29,136) producing a deviation of +3.6%.

40. Fortieth: 3 delegates; existing population 172,106 —a deviation of +0.2% (calculated with reference to the floater comprising the Forty-second)—consisting of the City of Virginia Beach. This district shall be altered by assigning to the Thirty-ninth CT's 400, 400.99, 402, 404, 406, 408 and 412 of Virginia Beach, as shown above, leaving the Fortieth with a total population of 142,970 (172,106 less 29,136), with a resulting deviation of +2.5%.

41. Forty-first: 2 delegates; existing population 110,963 —a deviation of +0.2% (calculated with reference to the floater comprising the Forty-second)—consisting of the City of Portsmouth. The Forty-first District is hereby eliminated as a separate district since Portsmouth is now made part of the Thirty-eighth.

42. Forty-second: 1 delegate; existing population 372,649—a deviation of +0.2% (calculated with reference to Thirty-eighth, Fortieth and Forty-first districts, now consolidated into the Thirty-eighth and Fortieth)—consisting of the cities of Chesapeake, Portsmouth and Virginia Beach. This district is hereby eliminated, with Virginia

Beach comprising the Fortieth, and Chesapeake (part) and Portsmouth comprising the Thirty-eighth, as shown above.[4]

43. Forty-third: 1 delegate; existing population 45,024 —a deviation of —3.2%—consisting of Nansemond County and the City of Suffolk. This district will be altered by the addition of CT's 212, 213.01 and 215.01 from Chesapeake and also by the addition of the counties of Isle of Wight (pop. 18,285) and Southampton (pop. 18,582), along with the City of Franklin (pop. 6,880). This district will also be assigned another delegate, bringing the total number of delegates to 2, with a total population of 96,370. This produced a deviation of +3.66%.

44. Forty-fourth: 1 delegate; existing population 43,747—a deviation of —5.9%—consisting of the counties of Isle of Wight and Southampton and the City of Franklin. This district shall be eliminated since the territory which it embodied is now made part of the Forty-third, as shown above.

45. Forty-fifth: 1 delegate; existing population 43,708 —a deviation of —6.0%—consisting of the counties of Greensville, Sussex, Surry, Charles City and New Kent, and the City of Emporia. This district shall be augmented by the addition of ED's 16 (pop. 489), 17 (pop. 1,392) and 18 (pop. 841) from Dinwiddie County adjacent to Sussex and Greensville counties. This change will brnig the population of the Forty-fifth to 46,430 (43,708 plus 2,722), resulting in a deviation of —0.12%.

46. Forty-sixth: 1 delegate; existing population 43,446 —a deviation of —6.5%—consisting of the counties of

[4] See note 1, supra. Applying DuVal's theory Virginia Beach would have had a deviation of +7.3% and Portsmouth a deviation of +6.1%.

Accomack and Northhampton. This is the maximum population deviation permitted in any district under the court's plan of reapportionment. The disparity is justified by the geographical location of the counties, known as the Eastern Shore. They form a neck of land separated by the Chesapeake Bay and the Atlantic Ocean from the mainland of Virginia, and are contiguous only to Maryland. The natural isolation of Accomack and Northampton counties warrants the deviation from the population standard. Consequently, the district shall remain as presently constituted.

47. Forty-seventh: Formerly: 1 delegate; existing population 44,387—a deviation of —4.5%—consisting of the counties of King George, Westmoreland, Northumberland, Richmond and Lancaster. This district shall be changed by the addition of ED's 1 (pop. 810) and 2 (pop. 949) out of Essex County (Forty-eighth), increasing the population of the Forty-seventh to 46,146 (44,387 plus 1,759), with the resulting deviation at —0.729%.

48. Forty-eighth: 1 delegate; existing population 47,609 —a deviation of +2.4%—consisting of the counties of Essex, King and Queen, Middlesex, Gloucester, Mathews and King William. This district shall be reduced in size by the transfer of ED's 1 and 2 from Essex County to be assigned, as mentioned above, to the Forty-seventh. The total population of the Forty-eighth after the change will be 45,850, with a deviation of —1.366%.

49. Forty-ninth: 3 delegates; existing population 138,177—a deviation of —.9%—consisting of the City of Newport News. No change is ordered here.

50. Fiftieth: 2 delegates; existing population 120,779—a deviation of —2.7%—(calculated with reference to the

oater described as District Fifty-two) consisting of the City of Hampton. This district will remain unaltered.

51. Fifty-first: 1 delegate; existing population 60,125—deviation of —2.7%—(calculated with reference to the loater described as District Fifty-two) consisting of the City of Williamsburg and the counties of York and James City. No change will be effected here.

52. Fifty-second: 1 delegate; existing population 180,004—a deviation of —2.7%—(calculated with reference to Districts Fifty and Fifty-one). This is a floater district consisting of the cities of Hampton and Williamsburg and the counties of York and James City. No alteration will be made here.[5]

Previously, we have alluded to the difficulty of equalizing districts when there is an over-represented group and there is no adjacent district which is under-represented. Examination of the delegate plan just outlined will reveal that this situation is sharply manifest in the Legislature's plan in districts 39, 43 and 44—City of Norfolk and Nansemond, Southhampton and Isle of Wight counties—located in the Tidewater area. They are characterized by under-population of 4.8% and thus over-represented. Districts 18, 19 and 20 are a group in Northern Virginia non-contiguous to the under-populated districts of Tidewater. They are beset with an over-population with an average of 5.4%.

Actually, this is the apple of discord between the parties plaintiff in *Duval-Parris* and the defendants who are upholding the current legislation. The only solution is the transfer of a delegate from Tidewater to Northern Vir-

[5] See note 1, supra. Applying the DuVal theory would produce a —2.7% deviation for Hampton, a —2.8% deviation for the combined populations of the City of Williamsburg and the counties of James City and York.

ginia, and it must be ordered. This is the only instance in which a delegate is transferred from one sector of the State to another. It is justified by the pervasive under-representation in districts in Northern Virginia, and over-representation in Tidewater, as earlier explained.

It is further justified by consideration of the growth trend of the Northern Virginia section as compared to that of Tidewater. Statewide, the average increase of population in the last 10 years has been at the rate of 17.2%. Northern Virginia's over the same period has increased 46%, while during this same span Norfolk's increment has been only 1%. Authoritative estimates put the expansion expected for Northern Virginia at 3.1% and Norfolk's at .1% annually. This is an element to be weighed, for apprehended enlargement may be appraised in determining the measure of legislative representation. Kirkpatrick v. Preisler, supra, 394 US 526, 535 (1969).

In mapping the delegate districts to eliminate unconstitutional malapportionment the prayers of the plaintiffs in *DuVal* and *Thornton* for single-member districts have not been overlooked, but they have not been granted. In Whitcomb v. Chavis, supra, ... US ....., 39 LW 4666 (June 7, 1971), multimember districts are declared not per se unconstitutional. Therefore, the Assembly's adoption of the representational theory which embodies multi-member rather than single-member districts is accepted. We are not unaware of the preference for single-member districts in "large" areas expressed in Connor v. Johnson, ... US ....., 39 LW 3535, 3535-3536 (June 3, 1971), but we do not think this decision is preclusive here. The circumstances here shown permit the utilization of multi-member districts, and we think none of them is too "large" to be outlawed by *Connor*. The holding in that case required the

elimination of a twelve member district; the court's plan delineates no district with more than seven members.

Likewise, we do not grant the prayer of *Parris* for the conversion of Fairfax County into an undivided district. The General Assembly is not shown to our satisfaction to have been reversibly wrong in this determination. Further, the *Parris* claim of the lack of equal protection is nullified by the splitting of counties elsewhere to avoid population unevenness. Again, a district of 11 delegates could run into *Connor* criticism.

Senatorial Districts

As heretofore noted, the General Assembly chose to divide the State into forty single-member Senatorial Districts. In applying this policy to Norfolk, and to ensure numerical equality, a contiguous urban area of the City of Virginia Beach, with its population count of 40, 195, was added to Norfolk's 307,951 persons. The entire area was then divided into three single-member Senatorial Districts, the Fifth, Sixth and Seventh, which are equal according to the Federal Census, numerically and conform almost ideally to the one person, one vote requirement.

To do so, however, the entire count of 36,693 naval personnel "home-ported" at the U.S. Naval Station, Norfolk, were assigned to the Fifth Senatorial District. Factually, it is without dispute that only 8,100, or so, of such crewmen actually live aboard the vessels which are assigned to a Census Tract within the Fifth Sentaorial District[6] The remainder, with their families, resides for the most part in the City of Norfolk, but to a considerable degree *not* in the Fifth Senatorial District.

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[6] Census policy allocates nearly all other individuals to the place where they reside.

The court has before it, therefore, evidence that 36,693 naval personnel are allocated to the Fifth Senatorial District because that is where official Census Tracts count them, when, in fact, at least 18,000[7] live outside of the Fifth Senatorial District, but generally within the area encompassed by the Fifth, Sixth and Seventh Districts. The allocation of the crewmen of vessels "home-ported" at Norfolk to certain Census Tracts is completely acceptable for Census purposes. This suffices for Congressional redistricting since most of them reside within the Second Congressional District. However, it is demonstrably inaccurate as applied to the individual Senatorial Districts. It is also constitutionally impermissible to ignore their presence for the purpose of legislative redistricting. Davis v. Mann, 377 US 678, 691 (1964).

If the single-member districts of the area were allowed to stand, the Fifth Senatorial District, in actuality, could fall far short of the one man, one vote ideal. Similarly, the Sixth and Seventh Districts could also be considerably out of proportion.

The court concludes, therefore, that the only way to correct these latent disparities is to provide for one multi-member Senatorial District for the area presently comprising Districts Five, Six and Seven, wherein an at-large election shall be conducted. By such action naval "home-ported" personnel can be properly spread through the entire area. Multi-member districts in such cases are not unconstitutional. Whitcomb v. Chavis, supra, ... US ....., 39 LW 4666 (June 7, 1971). With this determination, we have

[7] A Navy housing sampling taken in the same month as the official Census indicated about 50% of the "home-ported" crewmen maintained residences with Zip Code numbers outside of the Fifth Senatorial District. Upwards of 10,000 live off the base, but within the Fifth Senatorial District.

no occasion to descant separately upon the other grounds urged by *Howell* for a unitary Senatorial District at Norfolk.

As hereinbefore mentioned the court is cognizant of the recent observation in Connor v. Johnson, supra, ... US ....., 39 LW 3535, 3535-3536 (June 3, 1971), that single-member districts are preferable to "large multi-member districts" in reapportionment plans fashioned by District Courts, but again we do not consider this multi-member district to be "large" within the intent of that opinion.

The Court has no survey data as to place of actual residence sufficiently precise to permit creation of three single-member districts.

For an immediate understanding of the appearance of the delegate districts as now drawn, a chart depicting generally and substantially the mosaic will be presented herewith as an appendix. When superimposed upon the Legislature's reapportionment map, the changes now decreed become clearly evident.

Conclusion

We have undertaken a complete reapportionment of the State, rather than attempting a piecemeal correction confined to the direct targets of the complaints. This, we understand, is the precept of Burns v. Richardson, supra, 384 US 73, 83 (1966). While we have endeavored to reach a perfect mathematical division, we have been unable to do so because of the multiplicity of delegates, the geography of the State and the diversity of population concentrations. The highest degree of under-representation is 3.8% (Thirty-eighth), with the largest over-representation 3.4% (Thirty-

third, Thirty-fourth and Thirty-fifth).[8] The resulting spread of slightly over 7% is a sizeable improvement over the State's plan, which embodied a total variance in excess of 16%.[9] This apportionment is the best we can devise. We believe it comes within passable constitutional limits as "a good-faith effort to achieve absolute equality." Kirkpatrick v. Preisler, supra, 394 US 526, 531 (1969).

An order will now be entered effectuating this opinion.

[8] In this arithmetic Accomack and Northampton counties have not been included. The new reapportionment has not involved them because of their isolation from the remainder of the State. They make up the narrow peninsula separated from Virginia's mainland by Chesapeake Bay and the Atlantic Ocean. Their exception does not materially affect the submitted plan.

[9] The court's plan will be in slight excess of 8% disparity under the DuVal mode of computing floterial districts, footnote 1, supra.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Civil Action No. 105-71-N

Henry E. Howell, Jr., et al

v.

Joan S. Mahan, et al

Alexandria Division

Civil Action No. 111-71-A

Stanford E. Parris, et al

v.

Edgar A. Prichard, et al

Richmond Division

Civil Action No. 174-71-R

Clive L. DuVal, II, et al

v.

Edgar A. Prichard, et al

INTERLOCUTORY ORDER

On June 16, 1971 the Court as constituted for the trial of each of these actions heard the arguments of counsel upon the evidence adduced by all of the parties, including

the plaintiff- and defendant-intervenors, in each of these actions, consisting of depositions and documentary evidence, as well as explanatory exhibits presented with the arguments, and upon consideration thereof with the evidence proffered by plaintiff-intervenors William S. Thornton et al., on June 17, 1971, the respective courts in a joint written opinion this day filed have stated their findings of fact and conclusions of law in their respective causes. For the reasons stated in the opinion, it is, in all of said actions, ADJUDGED, ORDERED and DECREED as follows:

1. That the Acts of the General Assembly of Virginia generally known as the reapportionment statutes of 1971, and more particularly designated as the Act approved March 1, 1971, Chapter 116, Code of Virginia Section 24.1-12.1, and the Act approved March 1, 1971, Chapter 120, Code of Virginia Section 24.1-14.1, as amended by an Act approved June 14, 1971, Chapter 246, be, and each of them, is hereby declared invalid on the ground that they include provisions violating the Equal Protection Clause of the Constitution of the United States;

2. That members of the Senate and of the House of Delegates of the General Assembly of Virginia be elected from the electoral districts described in said opinion, anything in the existing statutes of the Commonwealth of Virginia to the contrary notwithstanding;

3. That such of the defendants herein, and their successors in office, as are charged by law with the conduct of said elections, as well as the agents, employees and attorneys thereof, be, and each of them is hereby, enjoined and restrained from conducting any of said elections in any electoral districts except those established and specified in said opinion as aforesaid;

4. That the Governor and Attorney General of Virginia be, and they are now, dropped as parties to these actions;

5. That the plaintiffs recover the cost allowed by law; and

6. That jurisdiction of each of these suits be, and it is hereby, retained for enforcement of this order, the determination of any related matter, and for any other appropriate purpose.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ OREN R. LEWIS
United States District Judge

/s/ JOHN A. MCKENZIE
United States District Judge

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

Entered 1 P.M.
July 2, 1971;

in the Clerk's office
Alexandria, Richmond
and Norfolk, Virginia

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 105-71-N

Henry E. Howell, Jr., et al.,

Plaintiffs

v.

Joan S. Mahan, et al.,

Defendants

Civil Action No. 175-71-R

Clive L. DuVal, 2d, et al.,

Plaintiffs

v.

Edgar A. Prichard, et al.,

Defendants

ORDER

This matter came on to be heard upon

(1) Motion of the defendants for the entry of an order staying the effect of the order of this Court of July 2, 1971, pending appeal to the Supreme Court of the United States; and

(2) Petition of the City of Virginia Beach for the entry of a like stay order pending appeal to the Supreme Court

of the United States and asking, in effect, for further argument on reapportionment, agreeing, however, that as an original intervenor it had only sought affirmation of its 1970 United States Census population figures, and was fully argued by counsel.

Upon consideration of all of which it is ORDERED that the motion for a stay pending appeal and the petition for rehearing by Virginia Beach, are DENIED.

/s/ JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia
July 13, 1971

CHAPTER 116—ACTS OF ASSEMBLY

An Act to amend the Code of Virginia by adding a section numbered 24.1-12.1, and to repeal § 24.1-12 of the Code of Virginia, the new and repealed sections relating to apportionment of members of the House of Delegates.

[H 63]

Approved Mar. 1, 1971

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding a section numbered 24.1-12.1 as follows:

§ 24.1-12.1. Apportionment of members of House of Delegates.—Members of the House of Delegates shall be distributed and apportioned, and each county, city and com-

bination is entitled to representation in the House of Delegates by a delegate, or by delegates, as follows:

First.—Dickenson, Lee, Wise, Scott and Norton, two.

Second.—Bristol, Smyth and Washington, two.

Third.—Russell, Tazewell and Buchanan, two.

Fourth.—Wythe, Grayson, Bland and Galax, one.

Fifth.—Craig, Giles and Pulaski, one.

Sixth.—Carroll, Floyd, Montgomery and Radford, two.

Seventh.—Roanoke City, two.

Eighth.—Roanoke County and Salem, two.

Ninth.—Franklin County, Rockbridge, Bedford County and Bedford City, and the cities of Lexington and Buena Vista, two.

Tenth.—Alleghany, Botetourt, Clifton Forge and Covington, one.

Eleventh.—Lynchburg, Amherst and Nelson, two.

Twelfth.—Campbell, one.

Thirteenth.—Patrick, Henry, Pittsylvania and Martinsville, three.

Fourteenth.—Danville, one.

Fifteenth.—Augusta, Highland, Staunton, Waynesboro and Bath, two.

Sixteenth.—Rockingham, Page, Shenandoah and Harrisonburg, two.

Seventeenth.—Frederick, Clarke, Fauquier, Warren and Winchester, two.

Eighteenth.—That portion of Fairfax County which lies in the Tenth Congressional District as described in §24.1-4.1 Fairfax City and Falls Church, five.

Nineteenth.—That portion of Fairfax County which lies in the Eighth Congressional District as described in § 24.1-4.1, five.

Twentieth.—Loudoun and Prince William, three.

Twenty-first.—Alexandria, two.

Twenty-second.—Arlington, three.

Twenty-third.—Alexandria and Arlington, one.

Twenty-fourth.—Hanover, Caroline, Stafford and Fredericksburg, two.

Twenty-fifth.—Culpeper, Rappahannock, Madison and Orange, one.

Twenty-sixth.—Albemarle, Greene, Fluvanna and Charlottesville, two.

Twenty-seventh.—Appomattox, Buckingham, Cumberland, Amelia and Prince Edward, one.

Twenty-eighth.—Charlotte, Halifax and South Boston, one.

Twenty-ninth.—Mecklenburg and Brunswick, one.

Thirtieth.—Petersburg, including those portions of Prince George and Dinwiddie Counties as described in the court's opinion in the annexation suit of Petersburg against the counties of Prince George and Dinwiddie, one.

Thirty-first.—Dinwiddie, excluding those portions encompassed within the thirtieth district, Lunenburg and Nottoway, one.

Thirty-second.—Louisa, Spottsylvania, Goochland and Powhatan, one.

Thirty-third.—Richmond City, five.

Thirty-fourth.—Henrico, three.

Thirty-fifth.—Henrico and Richmond City, one.

Thirty-sixth.—Chesterfield and Colonial Heights, two.

Thirty-seventh.—Prince George, excluding those portions encompassed within the thirtieth district, and Hopewell, one.

Thirty-eighth.—Chesapeake, two.

Thirty-ninth.—Norfolk, seven.

Fortieth.—Virginia Beach, three.

Forty-first.—Portsmouth, two.

Forty-second.—Virginia Beach, Chesapeake and Portsmouth, one.

Forty-third.—Nansemond and Suffolk, one.

Forty-fourth.—Southampton, Franklin City and Isle of Wight, one.

Forty-fifth.—Greensville, Emporia, Sussex, Surry, Charles City and New Kent, one.

Forty-sixth.—Accomack and Northampton, one.

Forty-seventh.—King George, Westmoreland, Northumberland, Richmond County and Lancaster, one.

Forty-eighth.—Essex, King and Queen, Middlesex, Gloucester, Mathews, and King William, one.

Forty-ninth.—Newport News, three.

Fiftieth.—Hampton, two.

Fifty-first.—James City, Williamsburg and York, one.

Fifty-second.—Hampton, James City, Williamsburg and York, one.

Reference to a county or city herein shall, unless otherwise specifically provided, be construed to mean the territory comprising such county or city as it exists on the effective date of this enactment notwithstanding future boundary changes by annexation, merger, consolidation or the voiding of boundary changes heretofore made final.

And the districts hereby created are hereby numbered one (1) to fifty-two (52), inclusive.

2. That § 24.1-12 of the Code of Virginia is hereby repealed.

CHAPTER 246—ACTS OF ASSEMBLY

An Act to amend and reenact § 24.1-14.1 of the Code of Virginia, relating to State senatorial districts.

[S 125]

Approved June 14, 1971

Be it enacted by the General Assembly of Virginia:

1. That § 24.1-14.1 of the Code of Virginia be amended and reenacted as follows:

§ 24.1-14.1. The Commonwealth is hereby divided into forty districts, each entitled to one senator, as follows:

First.—The city of Hampton.

Second.—The city of Newport News, less the territorial area of such city designated as Denbigh Precinct, Richneck Precinct and Reservoir Precinct, and less that corridor of land which divides Reservoir Precinct and provides ingress and egress to the Fort Eustis Military Reservation.

Third.—The counties of Accomack, James City, Northampton and York; the city of Williamsburg; and those parts of the city of Newport News designated the Denbigh Precinct, Richneck Precinct and Reservoir Precinct and that corridor of land which divides Reservoir Precinct in the City of Newport News and provides ingress and egress to Fort Eustis Military Reservation.

Fourth.—The counties of Charles City, Gloucester, Goochland, Hanover, King and Queen, King William, Louisa, Mathews, Middlesex and New Kent.

Fifth.—That portion of the city of Norfolk lying west of a line beginning at a point on the shore of the Chesapeake Bay due north of the point where the west fork of Granby Street intersects Ocean View Avenue, thence in a

southerly direction to such intersection, and along Granby Street to its point of intersection with Afton Avenue, thence in an easterly direction along Afton Avenue and an extension of such avenue to a point of intersection with the North Branch of the Lafayette River, thence in a southerly direction along the North Branch and the Lafayette River to its point of intersection with Granby Street, thence in a southerly direction along Granby Street to its point of intersection with Church Street, thence in a southerly direction along Church Street to its point of intersection with the Norfolk and Western Railway right of way, thence in a westerly direction along such right of way to its point of intersection with Colonial Avenue, thence in a southerly direction along Colonial Avenue to its point of intersection with Olney Road, thence in an easterly direction along Olney Road to its point of intersection with Duke Street, thence in a southerly direction along Duke Street to its point of intersection with Grace Street, thence in a westerly direction along Grace Street to The Hague inlet of the Elizabeth River, thence in a southerly direction to the Elizabeth River, and the boundary of the city of Chesapeake.

Sixth.—That portion of the city of Norfolk lying east of the Fifth Senatorial District and west of a line beginning at the point where the eastern boundary of the Community Park lying north of the Ocean View Golf Course meets the Chesapeake Bay, thence south on such eastern boundary to its point of intersection with Ocean View Avenue, thence in a southeasterly direction along Ocean View Avenue to its point of intersection with Chesapeake Boulevard, thence in a southerly direction along Chesapeake Boulevard to its point of intersection with Little Creek Road, thence in a westerly direction along Little Creek Road to its point of intersection with Sewells Point

Road, thence in a southeasterly and southerly direction along Sewells Point Road to its point of intersection with Princess Anne Road, thence in a southerly direction along Sewells Point Road to the upper finger of Broad Creek adjacent to Pine Ridge Road, thence in a southeasterly and southerly direction along Broad Creek to its point of intersection with the eastern branch of the Elizabeth River at the point where the boundaries of Chesapeake, Virginia Beach and Norfolk meet.

Seventh.—That portion of the city of Norfolk lying east of the Fifth and Sixth Senatorial Districts; and that portion of the city of Virginia Beach lying south and west of a line commencing at the point where the boundary with the city of Norfolk intersects Shore Drive, thence in a southeasterly direction along Shore Drive to its point of intersection with the western boundary of the Hampton Roads Sanitation property, North of Lake Smith, thence in a southerly direction along the center line of Lake Smith, across North Hampton Boulevard, and along the center line of the southeastern tributary of Lake Smith, and due south along the center line of such tributary to the northern-most point of the western property line of Bayside High School, thence in a southerly direction along such property line to its point of intersection with Haygood Road, thence in a northeasterly direction along Haygood Road to its point of intersection with Independence Boulevard, thence in a southerly direction along Independence Boulevard to its point of intersection with Witchduck Road, thence in a southwesterly direction along Witchduck Road to its point of intersection with the Virginia Beach-Norfolk Expressway, thence in an easterly direction along the Virginia Beach-Norfolk Expressway to its point of intersection with Independence Boulevard, thence in a

southerly direction along Independence Boulevard to its point of intersection with Holland Road, thence in a northwesterly direction along Holland Road to its point of intersection with Baxter Road, thence in a southwesterly direction along Baxter Road to its point of intersection with the dismantled Norfolk and Southern Railway right-of-way, thence in a southeasterly direction along such right-of-way to its point of intersection with the Kempsville and Princess Anne Borough line, thence in a southwesterly direction along such borough line to its point of intersection with the boundary with the city of Chesapeake, thence along such boundary in a northwesterly direction to its intersection with the boundary of the city of Norfolk.

Eighth.—That portion of the city of Virginia Beach not included in the Seventh Senatorial District, less that portion designated as the boroughs of Blackwater, Pungo and Princess Anne, except that the Eighth Senatorial District shall include all of the Oceana Naval Air Station.

Ninth.—That portion of the city of Richmond lying east and south of a line beginning at the point where the northern boundary with Henrico County intersects Chamberlayne Avenue, thence in a southerly direction along Chamberlayne Avenue to its point of intersection with Belvidere Street; thence in a southerly direction along Belvidere Street, across the Lee Bridge, and along Cowardin Avenue to its point of intersection with Hull Street, thence in a southwesterly direction along Hull Street to its intersection with Belt Boulevard, thence in a southeasterly direction along Belt Boulevard to its intersection with Broad Rock Road, thence in a southerly direction along Broad Rock Road to its intersection with Warwick Road; thence in an easterly direction along Warwick Road to its intersection with Hopkins Road, thence in a southerly direction along

Hopkins Road to its point of intersection with Grindall Creek, thence in an easterly direction along Grindall Creek to its point of intersection with the eastern right-of-way line of the Seaboard Coast Line Railroad, which right-of-way line was the 1942 Chesterfield boundary, thence in a southerly direction along such railroad right-of-way line to its point of intersection with the 1970 Chesterfield County boundary.

Tenth.—That portion of the city of Richmond lying west and north of the Ninth Senatorial District, less a portion of the city of Richmond lying south of a line beginning at the point where the eastern right-of-way line of the Seaboard Coast Line Railroad, which right-of-way line was the 1942 Chesterfield boundary, intersects Hull Street, thence in a northwesterly direction along such right-of-way line to its point of intersection with Midlothian Turnpike, thence in a westerly direction along Midlothian Turnpike to its point of intersection with the 1970 Chesterfield County boundary.

Eleventh.—That portion of the county of Chesterfield designated as Matoaca, Bermuda and Dale Magisterial Districts, and that part of the Clover Hill Magisterial District lying north and east of a line beginning at the point where State Route 653 intersects the Dale Magisterial District boundary, thence in a northerly direction along State Route 653 to its point of intersection with State Route 647, thence in an easterly direction along State Route 647 to its point of intersection with State Route 672, thence in a northerly direction along State Route 672 to its point of intersection with Midlothian Magisterial District; that portion of the county of Henrico lying south and east of a line beginning at the point where United States Route 360 intersects the boundary with the city of Richmond, thence

in a northerly direction along United States Route 360 to its point of intersection with Harvie Road, thence in an easterly direction along Harvie Road to its point of intersection with Laburnum Avenue, thence in a southeasterly direction along Laburnum Avenue to its point of intersection with Creighton Road, thence in the northeasterly direction along Creighton Road to the center line of the Chickahominy River, such center line being the boundary with Hanover County; and that portion of the city of Richmond not included in the Ninth and Tenth Senatorial Districts.

Twelfth.—That portion of Henrico County not included in the Eleventh Senatorial District.

Thirteenth.—The city of Portsmouth.

Fourteenth.—That portion of the county of Nansemond designated as the Sleepy Hole Magisterial District and that portion of the Cypress Magisterial District lying north of the Seaboard Coast Line Railroad; the city of Chesapeake; and that portion of the city of Virginia Beach designated as the boroughs of Blackwater, Pungo and Princess Anne, less that portion of the Oceana Naval Air Station which lies in the Borough of Princess Anne.

Fifteenth.—The counties of Dinwiddie, Greensville, Isle of Wight and Southampton; that portion of the county of Nansemond not included in the Fourteenth Senatorial District; and the cities of Emporia, Franklin and Suffolk.

Sixteenth.—The counties of Prince George, Surry and Sussex and the cities of Colonial Heights, Hopewell and Petersburg.

Seventeenth.—The counties of Amelia, Brunswick, Cumberland, Lunenburg, Mecklenburg, Nottoway and Powhatan, and that portion of the county of Chesterfield designated the Midlothian Magisterial District and that portion

of the Clover Hill Magisterial District not included in the Eleventh Senatorial District.

Eighteenth.—The counties of Appomattox, Buckingham, Charlotte, Halifax and Prince Edward; that portion of Campbell County designated as the Patrick Henry Magisterial District, the Long Mountain Magisterial District, the Central Magisterial District and that part of the Timberlake Magisterial District lying north of State Route 622; and the city of South Boston.

Nineteenth.—The county of Pittsylvania; that portion of the county of Campbell not included in the Eighteenth Senatorial District; and the city of Danville.

Twentieth.—The counties of Franklin, Henry and Patrick and the city of Martinsville.

Twenty-first.—That part of Roanoke County lying east of a line beginning at the point where the Norfolk and Western Railway intersects the Botetourt County boundary, thence in a southerly direction along such railway to its point of intersection with the eastern boundary of the city of Roanoke, thence in a southerly direction along such boundary to its point of intersection with United States Route 221, thence in a southerly direction along United States Route 221 to its point of intersection with former State Route 419, thence in an easterly direction along former State Route 419 to its point of intersection with State Route 613 (sometimes called the Starkey Road), thence in a southerly direction to the boundary of Franklin County; and the city of Roanoke.

Twenty-second.—The counties of Alleghany, Bath and Botetourt; that part of the county of Roanoke not included in the Twenty-first Senatorial District; and the cities of Salem, Clifton Forge and Covington.

Twenty-third.—The counties of Amherst and Bedford and the cities of Bedford and Lynchburg.

Twenty-fourth.—The counties of Augusta, Highland and Rockbridge and the cities of Buena Vista, Lexington, Staunton and Waynesboro.

Twenty-fifth.—The counties of Albemarle, Fluvanna, Greene, Nelson and Orange and the city of Charlottesville.

Twenty-sixth.—The counties of Culpeper, Madison, Page, Rappahannock and Rockingham and the city of Harrisonburg.

Twenty-seventh.—The counties of Clarke, Fauquier, Frederick, Warren and Shenandoah and the city of Winchester.

Twenty-eighth.—The counties of Caroline, Essex, King George, Lancaster, Northumberland, Richmond, Spotsylvania, Stafford and Westmoreland and the city of Fredericksburg.

Twenty-ninth.—The county of Prince William.

Thirtieth.—The city of Alexandria.

Thirty-first.—That portion of Arlington County south of a line beginning at the point where Wilson Boulevard intersects the Fairfax County boundary, thence in an easterly direction along Wilson Boulevard to its point of intersection with Jefferson Street, thence in a southerly direction along Jefferson Street to its point of intersection with Fifth Street north, thence in an easterly direction along Fifth Street north to its point of intersection with Frederick Street, thence in a southeasterly direction along Frederick Street to its point of intersection with Carlin Springs Road, thence in a northeasterly direction along Carlin Springs Road to its point of intersection with Glebe Road, thence in a northerly direction along Glebe Road to its point of intersection with the proposed Interstate 66 right-of-way, thence in a northeasterly direction along such right-of-way line to its point of intersection with an exten-

sion of Lorcom Lane, thence in a southeasterly direction along such extension of Lorcom Lane to its point of intersection with Cleveland Street, thence in a southerly direction along Cleveland Street to its point of intersection with Custis Road, thence in a southeasterly direction along Custis Road to its point of intersection with Wilson Boulevard, thence in a northeasterly direction along Wilson Boulevard to its point of intersection with Quinn Street, thence in a northerly direction along Quinn Street to its point of intersection with Eighteenth Street north, thence in an easterly direction along Eighteenth Street north to its point of intersection with the line of Pierce Street as extended, thence in a southerly direction along such extension of Pierce Street to its point of intersection with Wilson Boulevard, thence in an easterly direction along Wilson Boulevard to its point of intersection with Lynn Street, thence in a southerly direction along Lynn Street to its point of intersection with Arlington Boulevard, thence in an easterly direction along Arlington Boulevard to its point of intersection with the west bank of the Potomac River.

Thirty-second.—That portion of Fairfax County bounded on the west by Interstate Route 495 and on the south by the former right-of-way of the Washington and Old Dominion Railroad; that part of Arlington County not included in the Thirty-first Senatorial District; and the city of Falls Church.

Thirty-third.—Loudoun County and that portion of Fairfax County west of a line beginning at the point where Interstate Route 495 intersects the west bank of the Potomac River, thence in a southwesterly direction along Interstate Route 495 to its point of intersection with Interstate Route 66, thence in a southwesterly direction along Interstate Route 66 to its point of intersection with the

western boundary of the city of Fairfax, thence in a southwesterly direction along such boundary to its point of intersection with United States Routes 29 and 211, thence in a southwesterly direction along United States Routes 29 and 211 to its point of intersection with Shirley Gate Road, thence in a southwesterly direction along Shirley Gate Road to its point of intersection with Braddock Road, thence in a southeasterly direction along Braddock Road to its point of intersection with Ox Road, thence in a southerly direction along Ox Road to its point of intersection with Chapel Road, thence in a westerly direction along Chapel Road to its point of intersection with Yates Ford Road, thence in a southwesterly direction along Yates Ford Road to its point of intersection with Wolf Run, thence in a southeasterly direction and with the meanders of Wolf Run to its intersection with the Prince William boundary at Occoquan Creek.

Thirty-fourth.—That portion of the county of Fairfax within a line beginning at a point where the western boundary of Fairfax City intersects with the southern right-of-way line of United States Routes 29 and 211, thence in a southwesterly and southeasterly direction along the boundary of the Thirty-third Senatorial District to its point of intersection with Ox Road, thence in a southeasterly direction along Braddock Road to its point of intersection with Burke Station Road, thence in a northerly direction along Burke Station Road to its point of intersection with Laurel Street, thence in an easterly direction along Laurel Street to its point of intersection with Whiteacre Road, thence in a southerly direction along Whiteacre Road to its point of intersection with the southern Fairfax County School Board property line, thence in an easterly direction along such line, and continuing such line to a point of intersection with Olley Lane, thence in a northerly direction

along Olley Lane to its point of intersection with State Route 236, thence in a southeasterly direction along State Route 236 to its point of intersection with Hummer Road, thence in a northeasterly direction along Hummer Road to its point of intersection with Gallows Road and Annandale Road, thence in a northerly direction along Annandale Road to its point of intersection with Holmes Run, thence with the meanders of Holmes Run downstream to Sleepy Hollow Road, thence in a southerly direction along Sleepy Hollow Road to its point of intersection with Columbia Pike, thence in an easterly direction along Columbia Pike to its point of intersection with Old Columbia Pike, thence in a southerly direction along Old Columbia Pike to its point of intersection with State Route 236, thence in an easterly direction along State Route 236 to its point of intersection with the western boundary of the city of Alexandria, thence in a northerly direction along such boundary to the southwestern boundary of Arlington County, thence in a northwesterly direction along such boundary to the southern boundary of the city of Falls Church, thence in a westerly and northerly direction along such boundary to its point of intersection with a former right-of-way of the Washington and Old Dominion Railroad, thence in a southwesterly direction along said former railroad right-of-way to its point of intersection with Interstate Route 495, thence along the boundary of the Thirty-third Senatorial District to point of beginning; and the city of Fairfax.

Thirty-fifth.—That portion of Fairfax County within a line beginning at the Prince William boundary at Occoquan Creek and Wolf Run, thence in a northerly direction with the eastern boundary of the Thirty-third Senatorial District to the southern boundary of the Thirty-fourth Senatorial District, thence in an easterly direction along such boundary

to the western boundary of the city of Alexandria, thence in a southeasterly direction along such boundary to its point of intersection with Van Dorn Street, thence in a southerly direction along Van Dorn Street to the tracks of the Richmond, Fredericksburg and Potomac Railroad, thence in a southeasterly direction along such tracks to Newington Road, thence in a westerly direction along Newington Road to its point of intersection with Backlick Road, thence in a northerly direction along Backlick Road to its point of intersection with Interstate Route 95, thence in a southerly direction along Interstate Route 95 to its point of intersection with Pohick Creek, thence in a southeasterly direction along Pohick Creek to its point of intersection with Old Colchester Road, thence in a southwesterly direction along Old Colchester Road to its point of intersection with the Prince William boundary at Occoquan Creek, thence with such boundary in a northwesterly direction to Wolf Run and the point of beginning.

Thirty-sixth.—That portion of the county of Fairfax lying east of the Thirty-fifth Senatorial District.

Thirty-seventh.—The counties of Carroll, Floyd, Grayson and Montgomery and the cities of Galax and Radford.

Thirty-eighth.—The counties of Bland, Craig, Giles, Pulaski, Tazewell and Wythe.

Thirty-ninth.—The counties of Scott, Smyth and Washington; that portion of the county of Russell designated the Lebanon Magisterial District, and that portion of the Castlewood Magisterial District lying south and west of a line beginning at the point where State Route 65 intersects the Scott County boundary, thence in an easterly direction along State Route 65 to its point of intersection with State Route 683, thence in an easterly direction along State Route 683 to its point of intersection with State Route 615, thence

in a northerly direction along State Route 615 to its point of intersection with State Route 640, thence in an easterly and southerly direction along State Route 640, to its point of intersection with State Route 645, thence in a southerly direction along State Route 645 to its point of intersection with the boundary of Lebanon Magisterial District; and the city of Bristol.

Fortieth.—The counties of Buchanan, Dickenson, Lee and Wise; that portion of the county of Russell not included in the Thirty-ninth Senatorial District; and the city of Norton.

All references to districts, boundaries, streets and highways shall be interpreted to refer to those in existence on March one, nineteen hundred seventy-one.

ORDER ON FIRST HEARING

Upon consideration of the record and arguments of counsel, on brief and orally, the Court finds, and is of opinion and orders in each of the suits hereinbefore styled, as follows:

(1) Virginia is one of the States which has been subjected to the Voting Rights Act of 1965, 42 USC 1973b; that the revised constitution of Virginia, Article III, Section 6, requires the General Assembly to reapportion the State into electoral districts in the year 1971 and every ten years thereafter; that the 1971 legislative reapportionment statutes of Virginia, Acts of Assembly, 1971, chapters 116 and 120, are analogous to legislation held to constitute a device proscribed by Section 5 of the Voting Rights Act, supra, Perkins v. Matthews, 400 U.S. 379, 395 (1971); Allen v. State Board of Elections, 393 U.S. 544, 566, 568 (1969); that the Voting Rights Act, Section 5, supra,

therefore forbids the enforcement of Virginia's 1971 reapportionment legislation unless it is declared unobjectionable by the United States District Court for the District of Columbia or has not been objected to by the Attorney General of the United States; that the latter has in due time objected to the legislation; and that the Voting Rights Act confers no jurisdiction on this Court to approve or disapprove the ruling of the Attorney General, or to rule upon the effectiveness of the reapportionment legislation under the Voting Rights Act.

(2) On these findings the Court concludes that at this time the Court has no justiciable issue before it in regard to the validity of the reapportionment legislation in respect to Section 5 of the Voting Rights Act of 1965.

(3) The Court further finds that it would be impracticable to pass upon the validity of the reapportionment legislation with respect to the objections pressed in these suits, aside from the pertinence of the Voting Rights Act, until such reapportionment legislation is adopted by Virginia as is not in violation of Section 5 of the Voting Rights Act, as determined by the Attorney General of the United States or the United States District Court for the District of Columbia, inasmuch as the non-existence or removal alone of any valid objections asserted by the plaintiffs might not result in reapportionment legislation compatible with the provisions of the Voting Rights Act as applied by the Attorney General of the United States or the United States District Court for the District of Columbia.

(4) On these further findings, the Court further concludes that it should not at his time hear and decide only those issues made by these suits.

It is therefore ORDERED as follows:

(a) That the trial of these suits be continued to allow Virginia to procure the approval of the Attorney General of the United States or the United States District Court for the District of Columbia of the 1971 or other submitted reapportionment legislation;

(b) That the primary election now set by the laws of the State of Virginia for June 8 be postponed until September 14, 1971.

(c) That unless on or before June 15, 1971, Virginia has adopted and submitted reapportionment legislation either to the Attorney General of the United States or to the District Court for the District of Columbia for declaratory judgment as provided for in Section 5 of the Voting Rights Act, this Court shall proceed with the trial of these suits and thereafter formulate a plan of reapportionment within the prescription of the Voting Rights Act and resolving the valid objections, if any, of the plaintiffs to the 1971 reapportionment legislation; and

(d) That jurisdiction of these suits be retained by the Court until further order.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ OREN R. LEWIS
United States District Judge

/s/ JOHN A. MACKENZIE
United States District Judge

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

Judges Bryan and Merhige sign this order as to each of the cases; Judge MacKenzie as to Civil Action No. 105-71-N and Civil Action No. 174-71-R; Judge Lewis as to Civil Action No. 111-71-A.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ OREN R. LEWIS
United States District Judge

/s/ JOHN A. MACKENZIE
United States District Judge

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

May 24, 1971.

IN THE

UNITER STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Civil Action No. 105-71-N

Henry E. Howell, Jr., et al

v.

Joan S. Mahan, et al

Alexandria Division

Civil Action No. 111-71-A

Stanford E. Parris, et al

v.

Edgar A. Prichard, et al

Richmond Division

Civil Action No. 174-71-R

Clive L. DuVal, II, et al

v.

Edgar A. Prichard, et al

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed July 15, 1971)

Notice is hereby given that the intervenor defendant City of Virginia Beach hereby appeals to the Supreme Court of

the United States from the Interlocutory Order entered in the above styled actions on July 2, 1971, declaring invalid the reapportionment statutes of the Commonwealth of Virginia and ordering that members of the Senate and House of Delegates of Virginia be elected from electoral districts established by the Court.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ JOHN B. ASHTON
Special Counsel for the City of
Virginia Beach

J. DALE BIMSON
City Attorney
City of Virginia Beach
Municipal Center
Virginia Beach, Virginia 23456

HARRY FRAZIER, III
JOHN B. ASHTON
Hunton, Williams, Gay,
Powell & Gibson
700 East Main Street
Richmond, Virginia 23219
Special Counsel for the City
of Virginia Beach

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 174-71-R

Clive L. DuVal, 2d, et al.,

Plaintiffs

v.

Edgar A. Prichard, et al.,

Defendants

Civil Action No. 111-71-A

Stanford E. Parris, et al.,

Plaintiffs

v.

Edgar A. Prichard, et al.,

Defendants

Civil Action No. 105-71-N

Henry E. Howell, Jr., et al.,

Plaintiffs

v.

Joan S. Mahan, et al.,

Defendants

NOTICE OF APPEAL

Notice is hereby given that defendants Joan S. Mahan, U. P. Joyner, Jr. and Edgar A. Prichard, Members, Virginia State Board of Elections [defendants Linwood Hol-

ton, Governor of Virginia, and Andrew P. Miller, Attorney General of Virginia, having been deleted as party defendants], hereby appeal to the Supreme Court of the United States from the Interlocutory Order of this Court entered in the above styled actions on July 2, 1971, declaring invalid the reapportionment statutes of the Commonwealth of Virginia, redistricting the General Assembly of Virginia, as enacted by Chapters 116 and 120 of the 1971 Acts of Assembly, and ordering that elections be conducted pursuant to the legislative districts established and specified by the Court.

This appeal is taken pursuant to 28 U.S.C. § 1253.

JOAN S. MAHAN
U. P. JOYNER, JR.
EDGAR A. PRICHARD

By: /s/ ANTHONY F. TROY
Counsel

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
VANN H. LEFCOE
Assistant Attorneys General

Supreme Court–Library Building
Richmond, Virginia 23219

LETTER FROM DAVID L. NORMAN TO HONORABLE LINWOOD HOLTON

May 7, 1971

Honorable Linwood Holton
Governor of Virginia
Richmond, Virginia

Dear Governor Holton:

This letter is in reference to the enactments amending sections 24.1-41, 24.1-14, and 24.1-12 of the Virginia Code reapportioning districts for the Virginia Senate and House of Delegates and for the United States Congress. Those reapportionment enactments were submitted to the Attorney General pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, as construed by the Supreme Court, *Fairley* v. *Patterson,* 393 U.S. 544, 569 (1969); *Perkins* v. *Mathews,* 400 U.S. 379, 394 (1971).

Your submission was initially received on March 1, 1971, and additional material necessary to evaluate the submission was received on March 19 and 22. As we indicated in our letter of March 16, the Attorney General has sixty days within which to interpose an objection to a change affecting voting, commencing with the date on which he receives information sufficient to evaluate the submission.

We have given careful consideration to the submitted change and the supporting information as well as information received from private citizens. The Attorney General does not interpose an objection to the reapportionment of United States congressional districts and does not object to the redistricting of the Virginia Senate and House of Delegates except as follows:

(1) House Multi-Member Districts in Hampton, Newport News, Norfolk, Portsmouth, and Richmond.

A three-judge federal district court has held that where there are cognizable racial neighborhoods whose residents have an identity of interests (as is the case in most of our large cities), the technique of multi-member districts cannot be used if it tends to minimize the voting strength of racial minorities, *Chavis* v. *Whitcomb*, 305 F. Supp. 1364 (S.D. Ind. 1969). That case is on direct appeal to the Supreme Court and is now awaiting decision on the merits. 39 U.S.L.W. 3257. As long as that decision remains outstanding and unmodified, the Attorney General cannot approve the multi-member districts for Hampton, Newport News, Norfolk, Portsmouth, and Richmond, each of which has concentrations of racial minorities. You may wish to consider whatever decision is reached by the Supreme Court in the *Chavis* appeal in determining what alternatives remain available.

(2) Virginia Senate Districts 5 and 6 (Norfolk)

The holding of the Supreme Court in *Gamillion* v. *Lightfoot*, 364 U.S. 339 (1968), suggests that the voting rights of a racial minority can be infringed by drawing odd-shaped voting districts in which, in view of the available alternatives, the voting strength of that group is adversely affected. The division of Senate districts 5 and 6, which divides concentrations of Negro voters, appears contorted and does not conform to natural boundaries. It would appear that the district lines could be drawn more naturally to avoid the effect of adversely affecting the Negro voting strength.

I should like to add that the Voting Rights Act of 1965 permits seeking approval of all changes affecting voting by

the United States District Court for the District of Columbia irrespective of whether the change has previously been submitted to the Attorney General.

Sincerely,

DAVID L. NORMAN
Acting Assistant Attorney General
Civil Rights Division

COMMUNICATION FROM JOHN M. MITCHELL

June 10, 1971

Federal Government Teletype Service
From: Washington, D. C.

In accordance with your request, we have reconsidered our objection to the multimember aspects of the plan of reapportionment of the Virginia House of Delegates. Inasmuch as our objection was based on the decision of the United States District Court in Whitcomb v. Chavis and that decision was reversed on June 7, 1971 by the Supreme Court, our objection to the House multimember districting is hereby withdrawn. Please be advised that Section 5 of the Voting Rights Act provides that our failure to object does not bar a subsequent legal action if such is needed.

Signed,

JOHN M. MITCHELL
Attorney General of the United States

LETTER FROM DAVID L. NORMAN TO HONORABLE LINWOOD HOLTON

August 13, 1971

Honorable Linwood Holton
Governor of Virginia
Richmond, Virginia 23219

Dear Governor Holton:

This is in reference to Senate Bill 125 proposing changes to Senate Districts 5, 6 and 34 for the Commonwealth of Virginia which you submitted to the Attorney General on June 14, 1971, pursuant to Section 5 of the Voting Rights Act of 1965.

I understand that on July 2, 1971, after the referenced legislation was submitted to the Attorney General, the United States District Court for the Eastern District of Virginia further altered the Virginia reapportionment plan and, among other things, decreed that the area encompassed by proposed Senate districts 5 and 6 in the referenced legislation should hold its elections for state senator on an at-large basis. I further understand that the ruling of the Court is now in appeal.

Since the Court ordered plan has not finally been decided in the courts and since the 60 day period for the Attorney General's consideration of your submission of the proposed district expires today, I believe it would be appropriate to advise you that the Attorney General interposes no objection to the changes embodied in the legislation submitted. Therefore, should the litigation of this matter result in a reinstatement of the districts described in

Senate Bill 125, no further submission to the Attorney General will be necessary.

Sincerely,

DAVID L. NORMAN
Acting Assistant Attorney General
Civil Rights Division

THE POPULATION OF THE SENATORIAL DISTRICTS

	District	*Population*	*Percentage*
1	Hampton	120,779	+3.9
2	Newport News (part)	121,200	+4.3
3	Newport News (part) York James City Williamsburg Accomack Northampton		
	Total	120,548	+3.7
4	Charles City New Kent Gloucester Mathews Middlesex King & Queen King William Hanover Goochland Louisa		
	Total	113,520	—0.2
5	Norfolk (part)	116,084	—0.1
6	Norfolk (part)	116,103	—0.002
7	Norfolk (part) Virginia Beach (part)		
	Total	115,959	—0.2
8	Virginia Beach (part)	116,528	+0.2
9	Richmond (part)	115,400	—0.7

	District	*Population*	*Percentage*
10	Richmond (part)	115,950	—0.2
11	Henrico (part)	114,638	—1.4
12	Chesterfield(part) Henrico (part) Richmond (part) Total	114,846	—1.175
13	Portsmouth	110,963	—4.517
14	Virginia Beach (part) Nansemond (part) Chesapeake Total	111,840	—3.56
15	Nansemond (part) Suffolk Isle of Wight Southampton Greensville Dinwiddie Franklin Emporia Total	121,844	+4.645
16	Sussex Surry Prince George Hopewell Petersburg Colonial Heights Total	121,109	+4.214

	District	*Population*	*Percentage*
17	Brunswick Mecklenburg Lunenburg Nottoway Amelia Cumberland Powhatan Chesterfield (part)		
	Total	113,018	—2.748
18	Halifax South Boston Charlotte Campbell (part) Appomattox Prince Edward Buckingham		
	Total	117,987	+1.527
19	Pittsylvania Danville Campbell (part)		
	Total	113,788	—2.085
20	Henry Martinsville Patrick Franklin		
	Total	112,694	—3.027
21	Roanoke City Roanoke County (part)		
	Total	116,572	+0.309

	District		*Population*	*Percentage*
22	Roanoke County (part)			
	Salem			
	Botetourt			
	Alleghany			
	Clifton Forge			
	Covington			
	Bath			
		Total	116,271	+0.050
23	Bedford County			
	Bedford City			
	Lynchburg			
	Amherst			
		Total	112,894	—2.855
24	Rockbridge			
	Buena Vista			
	Lexington			
	Augusta			
	Staunton			
	Waynesboro			
	Highland			
		Total	118,619	+2.071
25	Nelson			
	Albemarle			
	Charlottesville			
	Greene			
	Fluvanna			
	Orange			
		Total	115,023	—1.023

	District		Population	Percentage
26	Harrisonburg Rockingham Page Madison Culpeper Rappahannock			
		Total	111,131	—4.372
27	Frederick Winchester Shenandoah Clarke Warren Fauquier			
		Total	116,166	—0.039
28	Stafford Fredericksburg Spotsylvania King George Caroline Westmoreland Northumberland Richmond Essex Lancaster			
		Total	120,872	+4.009
29	Prince William		111,102	—4.397
30	Alexandria		110,938	—4.538
31	Arlington County (part)		115,190	—0.879

	District	*Population*	*Percentage*
32	Falls Church Fairfax County (part) Arlington County (part)		
	Total	115,051	—0.999
33	Loudoun County Fairfax County (part)		
	Total	117,043	+0.715
34	City of Fairfax Fairfax County (part)		
	Total	116,689	+0.4
35	Fairfax County (part)	117,166	+0.8
36	Fairfax County (part)	118,058	+1.6
37	Montgomery Radford Floyd Carroll Grayson Galax		
	Total	113,337	—2.5
38	Tazewell Bland Giles Pulaski Wythe Craig		
	Total	117,207	+0.9

	District		*Population*	*Percentage*
39	Scott Washington Bristol Smyth Russell (part)			
		Total	122,242	+5.18
40	Lee Wise Norton Dickenson Buchanan Russell (part)			
		Total	122,125	+5.088
TOTAL STATE POPULATION			4,648,494	
AVERAGE DISTRICT			116,212	

POPULATION STATISTICS FOR 1971 DELEGATE DISTRICTS

Location	*Population*	*% Variance/Seat From 46,485 (Optimum)*	*Seats*	*Pop/Seat*
First: Dickenson, Lee, Wise, Scott, Norton	100,722	+8.3	2	50,361
Second: Bristol, Smyth, Washington	87,041	—6.4	2	43,521
Third: Russell, Tazewell, Buchanan	96,420	+3.7	2	48,210
Fourth: Wythe, Grayson, Bland, Galax	49,279	+6.0	1	49,279
Fifth: Craig, Giles, Pulaski	49,829	+7.2	1	49,829
Sixth: Carroll, Floyd, Montgomery, Radford	91,620	—1.5	2	45,810
Seventh: Roanoke City	92,115	—0.9	2	46,058
Eighth: Roanoke Co., Salem	89,321	—3.9	2	44,661

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop/Seat
Ninth: Franklin Co. Rockbridge Bedford Co. Bedford City Lexington Buena Vista	90,256	—2.9	2	45,128
Tenth: Alleghany Botetourt Clifton Forge Covington	46,215	—0.6	1	46,215
Eleventh: Lynchburg Amherst Nelson	91,857	—1.2	2	45,929
Twelfth: Campbell	43,319	—6.8	1	43,319
Thirteenth: Patrick Henry Pittsylvania Martinsville	144,625	+3.7	3	48,208
Fourteenth: Danville	46,391	—0.2	1	46,391
Fifteenth: Augusta Highland Staunton Waynesboro Bath	93,152	+0.2	2	46,576
Sixteenth: Rockingham Page Shenandoah Harrisonburg	101,928	+9.6	2	50,964

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop/Seat
Seventeenth: Frederick Clarke Fauquier Warren Winchester	93,314	+0.4	2	46,657
Eighteenth: Fairfax City Falls Church (Part) Fairfax County	246,509	+6.1	5	49,302
Nineteenth: (Part) Fairfax County	241,254	+3.7	5	48,251
Twentieth: Loudoun Prince William	148,252	+6.3	3	49,417
Twenty-first, Twenty-second and Twenty-third (floater): Alexandria Arlington	285,222	+2.3	6	47,537
Twenty-first, proportionate share of Twenty-third (floater): Alexandria	110,938	—0.1	2.39	46,417
Twenty-second, proportionate share of Twenty-third (floater): Arlington	174,284	+3.9	3.61	48,278

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop/Seat
Twenty-fourth: Hanover Caroline Stafford Fredericksburg	90,441	—2.7	2	45,221
Twenty-fifth: Culpeper Rappahannock Madison Orange	45,847	—1.4	1	45,847
Twenty-sixth: Albemarle Greene Fluvanna Charlottesville	89,529	—3.7	2	44,765
Twenty-seventh: Appomattox Buckingham Cumberland Amelia Prince Edward	48,531	+4.4	1	48,531
Twenty-eighth: Charlotte Halifax South Boston	48,516	+4.4	1	48,516
Twenty-ninth: Mecklenburg Brunswick	45,598	—1.9	1	45,598
Thirtieth: Petersburg (Increased annex area)	45,176	—2.8	1	45,176

Location	Population	% Variance/Seat From 46,485 (Optimum)	Pop/Seat	Seats
Thirty-first: Dinwiddie Lunenburg Nottoway (Annexed loss—Dinwiddie)	47,455	+2.1	1	47,455
Thirty-second: Louisa Spottsylvania Goochland Powhatan	48,193	+3.7	1	48,193
Thirty-third: Richmond City	249,621	—3.4	5	44,887
Thirty-third plus proportionate share of Thirty-fifth (floater): Richmond	249,621	—4.4	5.62	44,417
Thirty-fourth: Henrico	154,364	—3.4	3	44,887
Thirty-fourth plus proportionate share of Thirty-fifth (floater): Henrico	154,364	—1.8	3.38	45,670
Thirty-fifth: Richmond City and Henrico (floater)		—3.4	1	44,887
Thirty-sixth: Chesterfield Colonial Heights	91,952	—1.1	2	45,976

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop/Seat
Thirty-seventh: Prince George Hopewell Annexed loss— Prince George	47,028	+1.2	1	47,028
Thirty-eighth, Fortieth, Forty-first, Forty-second (floater): Chesapeake Virginia Beach Portsmouth	372,649	+0.2	8	46,581
Thirty-eighth, proportionate share of the Forty-second (floater): Chesapeake	89,580	—14.0	2.24	39,991
Fortieth, proportionate share of the Forty-second (floater): Virginia Beach	172,106	+7.0	3.46	49,742
Forty-first, proportionate share of the Forty-second (floater): Portsmouth	110,963	+3.8	2.3	48,245
Thirty-ninth: Norfolk	307,951	—5.4	7	43,993
Forty-third: Nansemond Suffolk	45,024	—3.2	1	45,024
Forty-fourth: Southampton Franklin City Isle of Wight	43,747	—5.9	1	43,747

Location	Population	% Variance/Seat From 46,485 (Optimum)	Seats	Pop/Seat
Forty-fifth: Greensville Emporia Sussex Surry Charles City New Kent	43,708	—6.0	1	43,708
Forty-sixth: Accomack Northampton	43,446	—6.5	1	43,446
Forty-seventh: King George Westmoreland Northumberland Richmond Co. Lancaster	44,387	—4.5	1	44,387
Forty-eighth: Essex King & Queen Middlesex Gloucester Mathews King William	47,609	+2.4	1	47,609
Forty-ninth: Newport News	138,177	—0.9	3	46,059
Fiftieth, Fifty-first, Fifty-second (floater): Hampton James City Williamsburg York	180,904	—2.7	4	45,226

71-373

FILE

Supreme Court of the United States

LE COPY October Term, 1971

No. A-83

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

STANFORD E. PARRIS, ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

CLIVE L. DUVAL, 2D, ET AL.,

Appellees.

On Direct Appeal from the United States District Court
for the Eastern District of Virginia

MOTION TO DISMISS AND APPENDIX

LEONARD H. DAVIS
City Attorney

GORDON B. TAYLOR, JR.
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Norfolk, Virginia 23501

Counsel for the Appellee,
City of Norfolk

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Supreme Court of the United States

October Term, 1971

No. A-83

CITY OF VIRGINIA BEACH,

v. *Appellant,*

HENRY E. HOWELL, JR., ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

v. *Appellant,*

STANFORD E. PARRIS, ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

v. *Appellant,*

CLIVE L. DuVAL, 2D, ET AL.,

Appellees.

On Direct Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO DISMISS

The appellee, City of Norfolk, moves the court to dismiss the appeal herein on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and that the appellant, City of Virginia Beach, intervened into this action for the sole purpose of protecting the integrity of the 1970 decennial census and did not wish to be heard on the issue of legislative reapportionment until after the trial court's written opinion was filed and an interlocutory order was entered.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute.

This appeal raises the question of the validity of the Virginia reapportionment plan which was held to be unconstitutional as contained in Chapter 116, Acts of Assembly of 1971, setting forth a reapportionment plan for the House of Delegates, and Chapter 120, as amended and reenacted by Chapter 246, Acts of Assembly of 1971, setting forth a reapportionment plan for the Senate. Said acts appear in the joint appendix filed by the appellant at pages 27-43.

B. The Proceedings Below.

The General Assembly of Virginia reapportioned its electoral districts on March 1, 1971. Thereafter, three suits were filed, two, DuVal v. Prichard and Parris v. Prichard, attacked the reapportionment scheme of the House of Delegates and one, Howell v. Mahan, attacked the reapportionment scheme of the Senate.

When the issue was raised whether the City of Norfolk should be able to include naval personnel as residents who are stationed aboard naval vessels whose home port is Norfolk and thus entitling Norfolk to seven (7) rather than six (6) delegates, the City of Norfolk intervened.

The City of Virginia Beach, thereafter, also intervened, but it only addressed itself to the limited issue of whether the 1970 decennial census was a constitutional basis for legislative apportionment. (See City of Virginia Beach's Petitions to Intervene in appendix herein.)

Other parties intervened as plaintiffs and defendants, up to, and including the date of trial, May 24, 1971.

Virginia, being one of the states singled out under the Voting Rights Act of 1965, 42 U.S.C.A. Sec. 1973, et seq., submitted its reapportionment plan to the U.S. Attorney General as provided under Sec. 1973(c) of said Voting Rights Act. On May 7, 1971, the legislature was informed that the U.S. Attorney General would not approve said reapportionment legislation.

On the trial date, May 24, 1971, the trial court would not hear the case on its merits, holding it had no jurisdiction. (See "Order on First Hearing," appellant's appendices 43-46.)

However, after the decision of *Whitcomb* v. *Chavitz,* 39 U.S. Law Week 4666 (U.S., June 7, 1971), the U.S. Attorney General's office withdrew its objections to the Virginia legislature reapportionment plan.

At the second hearing on June 16, 1971, during arguments, Delegate James M. Thomson, an intervenor in the case and also Chairman of the House of Delegates' Privileges and Elections Committee, informed the trial court that the House of Delegates had been given every opportunity to amend its plan between the first hearing on May 24, 1971 and the second hearing, in an effort to correct the alleged unconstitutional deviations that had been set out in the various complaints filed in the two house suits in issue. Mr. Thomson was instructed to furnish the trial court other reapportionment schemes submitted but not adopted by the House of Delegates.

Also at the second hearing on June 16, 1971, during the argument of the appellee, Senator Howell, in the case of Howell v. Mahan, Senator Howell told the trial court that he had made great effort to have the Senate correct the alleged unconstitutional defects, but that the senate also had refused to take any action.

It is apparent because of said arguments of parties, Thomson and Howell, the trial court concluded the General Assembly had been given sufficient opportunity to devise a constitutional reapportionment scheme. But because of the General Assembly's refusal to act, the trial court decided to enact a plan which had minimal population deviations and which was not based upon the principle of maintaining traditional political subdivisions.

II.

ARGUMENT

The Appellant, City Of Virginia Beach, Is Untimely In Its Interest In The Issue Of The Number Of Delegates Assigned To It.

As reflected in the trial court's order denying a rehearing to the City of Virginia Beach on pages 26 and 27 of the appellant's appendix, the City of Virginia Beach was one of the intervenors in the three suits and elected to take part in the cases on the limited issue of whether the 1970 decennial census was a constitutional basis upon which the General Assembly of Virginia based its 1970 legislative reapportionment.

Every opportunity was afforded the City of Virginia Beach to be heard on all issues. It declined to do so until after the trial court's decision.

The appellant's motion for rehearing pursuant to Rule 60(b)1, Federal Rules of Civil Procedure, that the City of Virginia Beach was surprised by the order, is astonishing inasmuch as the main issue at the trial was legislative apportionment.

The law is well settled that a party to a law suit cannot go beyond the issues set out in its pleadings. Accordingly, the City of Virginia Beach is bound by its pleading to the issue

of the integrity of the 1970 decennial census. 41 Am. Jur. (Pleading, Sec. 374) P. 550.

The Case Presents No Substantial Question Not Previously Decided By This Court.

Since the case of *Reynolds* v. *Sims,* 377 U.S. 533 (1964), the law has been well settled, to wit: "Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state." At page 579.

The trial court's ruling in the two house cases, DuVal v. Prichard and Parris v. Prichard, was that the house's apportionment scheme, attempting to maintain traditional boundaries of political subdivisions, caused a 16.4% overall population variance and did not meet constitutional standards.

Accordingly, the court saw fit to adopt its own plan after being informed of the General Assembly's failure to do so. This plan, not including the Forty-Sixth House Legislative District, has an overall population variance of only 7.2%.

In attempting to "make a good faith effort to achieve precise mathematical equality" in legislative representation (*Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969) Pp. 530-531), discounting traditional political subdivision boundaries, it is obvious in Virginia that two or more political subdivisions would have to be combined in some election districts.

These combinations providing equal representation which the court felt compelled to make, are discretionary. If the court's act of redistricting was correct, then no political subdivision should have standing to object.

It is ironic that the City of Virginia Beach suggests as an available alternative to place some citizens of Norfolk in Virginia Beach. It evidently contends this is constitutionally permissible.

III.

CONCLUSION

Wherefore, appellee, City of Norfolk, respectfully submits that the City of Virginia Beach should not be permitted to raise its objection to the trial court's decisions for the reasons stated herein and that the questions upon which this cause depend are so unsubstantial as not to need further argument and appellee, City of Norfolk, respectfully moves the court to dismiss this appeal.

Respectfully submitted,

GORDON B. TAYLOE, JR.
Assistant City Attorney
Counsel for Appellee,
City of Norfolk

LEONARD H. DAVIS
City Attorney

GORDON B. TAYLOE, JR.
Assistant City Attorney
Room 908, City Hall Building
Civic Center
Norfolk, Virginia 23501

Counsel for the Appellee,
City of Norfolk

CERTIFICATE OF SERVICE

I, Gordon B. Tayloe, Jr., counsel for the City of Norfolk and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Motion to Dismiss, in the United States Mails, first class postage prepaid, this 8th day of October, 1971, ad-

dressed to The Honorable Andrew P. Miller, Supreme Court Building, Richmond, Virginia 23219; James M. Thomson, Esquire, P.O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esquire, 1425 H Street, N.W., Suite 822, Washington, D.C. 20005; Stanford E. Parris, Esquire, 4085 Chain Bridge Road, Fairfax, Virginia 22030; Harry Frazier, III, Esquire, 700 East Main Street, Richmond, Virginia 23219; C. Stanley Dees, Esquire, 314 North Pitt Street, Alexandria, Virginia 22314; Robert L. Weinberg, Esquire, 1000 Hill Building, Washington, D.C. 20006; The Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, P.O. Box 1531, Norfolk, Virginia 23501; The Honorable R. F. Horan, Jr., Commonwealth's Attorney of Fairfax County, Fairfax, Virginia 22030; The Honorable Henry E. Howell, Jr., 808 Maritime Tower, Norfolk, Virginia 23510; The Honorable Peter K. Babalas, 210 Rotunda Building, Norfolk, Virginia 23510; The Honorable Henry L. Marsh, III, Hill, Tucker and Marsh, 214 East Clay Street, Richmond, Virginia 23219; Armand Derfner, Esquire, 520 Woodward Building, 733 15th Street, N.W., Washington, D.C. 20005; Benjamin W. Dulany, Esquire, 822 Southern Building, Washington, D.C.; C. V. Spratley, Jr., Esquire, P.O. Box 575, Newport News, Virginia 23607; and The Honorable David L. Norman, Acting Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530.

GORDON B. TAYLOE, JR.
Assistant City Attorney
Counsel for Appellee,
City of Norfolk

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

CIVIL ACTION No. 105-71-N

HENRY E. HOWELL, JR., et al.,

Plaintiffs,

v.

JOAN S. MAHAN, et al.,

Defendants.

ANSWER OF THE INTERVENOR, CITY OF VIRGINIA BEACH TO THE PLAINTIFFS' COMPLAINT

Now comes the intervenor, City of Virginia Beach, and for answer to the plaintiffs' complaint filed herein, says:

1. That it admits the allegations contained in paragraphs numbered I, II, III, IV, V, VI, VII, VIII and IX of the complaint.

2. That it denies the allegations contained in paragraph numbered X of the complaint.

3. That as to the allegations contained in paragraph numbered XI:

It admits the allegations contained therein, although it avers that they are allegations of law and need not be answered.

4. That as to the allegations contained in paragraph numbered XII:

a. Norfolk is entitled to 2.65 Senators rather than 2.64 Senators as alleged;

b. It admits the remaining allegations.

5. That as to the allegations contained in paragraphs numbered XIII, XIV and XV of the complaint:

a. It denies the allegations contained therein;

b. It further asserts that the official Bureau of Census, U.S. Department of Commerce, population figures are a constitutional criterion upon which the General Assembly of the Commonwealth of Virginia can legislatively apportion its membership.

6. That it denies the allegations contained in paragraphs numbered XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI and XXVII of the complaint.

FIRST DEFENSE

That it specifically avers that the official Bureau of Census, U.S. Department of Commerce, population figures are a constitutional criterion upon which the General Assembly of the Commonwealth of Virginia can legislatively apportion its membership.

CITY OF VIRGINIA BEACH

By /s/ J. Dale Bimson
J. DALE BIMSON
City Attorney

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

CIVIL ACTION No. 105-71-N

HENRY E. HOWELL, JR., et al.,

Plaintiffs,

v.

JOAN S. MAHAN, et al.,

Defendants.

PETITION FOR LEAVE TO INTERVENE

Now comes the City of Virginia Beach, a municipal corporation chartered under the laws of Virginia, and moves the Court by proper order to make it a party defendant in the above styled suit, and as grounds for such petition avers:

1. That the Bureau of Census, U.S. Department of Commerce, has certified that its 1970 census reflected the population of the City of Virginia Beach, Virginia, to be 172,106.

2. That the plaintiff in his complaint prays this Court to rule that said 1970 population figure is not accurate as a basis for the Legislature to apportion the number of seats within the Senate of the General Assembly of Virginia.

3. That if the official population figures certified by the Bureau of Census, U.S. Department of Commerce, are deemed to be an unconstitutional criterion upon which the General Assemply could apportion its members for the

reasons alleged in the complaint, the City of Virginia Beach would be materially affected in the following way:

Certain Federal and State funds based upon the population figures of the Bureau of Census, U.S. Department of Commerce, would be reduced.

Consequently, the petitioner is a necessary party pursuant to Rule 24(a), Rules of Federal Civil Procedure and is vitally interested in the defense of this case.

Wherefore, your petitioner asks leave to intervene as a party defendant in this action; that it be allowed to defend this action as such; and that the Court grant such other and further relief as the Court may deem proper.

CITY OF VIRGINIA BEACH

By /s/ J. Dale Bimson
J. DALE BIMSON
City Attorney

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

CIVIL ACTION No. 105-71-N

HENRY E. HOWELL, JR., et al.,

Plaintiffs,

v.

JOAN S. MAHAN, et al.,

Defendants.

ORDER

This matter having come upon notice and petition for leave to intervene filed on behalf of the City of Virginia Beach, and

For good cause shown, it is

ORDERED that the City of Virginia Beach be made a party defendant and to file such pleadings as it deems necessary, but such intervention shall not serve to enlarge or extend any discovery cut-off dates or hearing date heretofore established.

Enter: April 16, 1971

/s/ John A. McKenzie
United States District Judge

Norfolk, Virginia

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

CIVIL ACTION No. 174-71-R

CLIVE L. DUVAL, II, et al.,

Plaintiffs,

v.

EDGAR A. PRICHARD, et al.,

Defendants.

PETITION FOR LEAVE TO INTERVENE

Now comes the City of Virginia Beach, a municipal corporation chartered under the laws of Virginia, and moves the Court by proper order to make it a party defendant in the above-styled suit, and as grounds for such petition avers:

1. That the Bureau of Census, U.S. Department of Commerce, has certified that its 1970 census reflected the population of the City of Virginia Beach, Virginia, to be 172,106.

2. That within this population figure of 172,106 are included approximately 5,565 Navy and Coast Guard personnel who are counted for purposes of the census on board vessels home-ported in Virginia Beach.

3. That the plaintiffs seek to invalidate the manner in which Navy and Coast Guard personnel are enumerated in the population figure of the Bureau of Census.

4. That if the manner in which Navy and Coast Guard personnel are enumerated in the population figures of the Bureau of Census is invalidated the City of Virginia Beach would be materially affected in the following way:

Certain Federal and State funds based upon the population figures of the Bureau of Census, U.S. Department of Commerce, would be reduced.

Consequently, the petitioner is a necessary party pursuant to Rule 24(a), Rules of Federal Civil Procedure and is vitally interested in the defense of this case.

Wherefore, your petitioner asks leave to intervene as a party defendant in this action; that it be allowed to defend this action as such; and that the Court grant such other and furher relief as the Court may deem proper.

CITY OF VIRGINIA BEACH

By /s/ Harry Frazier, III
HARRY FRAZIER, III
Special Counsel for the City
of Virginia Beach

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

CIVIL ACTION No. 174-71-R

CLIVE L. DUVAL, II, et al.,

Plaintiffs,

v.

EDGAR A. PRICHARD, et al.,

Defendants.

ORDER

This matter having come upon notice and petition for leave to intervene filed on behalf of the City of Virginia Beach, and

For good cause shown, it is

ORDERED that the City of Virginia Beach be made a party defendant and to file such pleadings as it deems necessary, but such intervention shall not serve to enlarge or extend any discovery cut-off dates or hearing date heretofore established.

Enter: 4-28-71

/s/ Robert R. Merhige, Jr.
United States District Judge

Richmond, Virginia

FILE COPY

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IN THE

Supreme Court of the United States

No. 71-364

EDGAR A. PRICHARD,
Member State Board of Elections, *et al.*,
Appellants,

v.

CLIVE L. DuVAL, II, *et al.*,
Appellees.

MOTION TO AFFIRM SUBMITTED BY APPELLEE
Clive L. DuVal, II

CLIVE L. DUVAL, II
2000 N. 15th Street
Arlington, Virginia 22216

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE

Supreme Court of the United States

No.

EDGAR A. PRICHARD,
Member State Board of Elections, *et al.*,
Appellants,

v.

CLIVE L. DuVAL, II, *et al.*,
Appellees.

MOTION TO AFFIRM SUBMITTED BY APPELLEE
Clive L. DuVal, II

Appellee Clive L. DuVal, II., pursuant to Rule 16 of this Court, moves that the interlocutory order and decree of the three judge District Court for the Eastern District of Virginia herein appealed from be affirmed as to the Virginia House of Delegates reapportionment plan on the ground that the question is so insubstantial as not to require further argument.

As was pointed out in the opinion of the District Court, the House of Delegates reapportionment statute was patently unconstitutional because of grave population inequalities. The deviations from absolute equality in the legislative districts ranged from underrepresentation of 9.6 percent to an overrepresentation of 14 percent, or a total variance of 23.6 percent. The lower court properly held that such a plan did not meet the constitutional need for population equality. *Kirkpatrick v. Preisler*, 394 U.S. 526; *Wells v. Rockefeller*, 394 U.S. 542.

Contrary to the intimation in appellants' jurisdictional statement, the District Court did not act hastily or before the Virginia General Assembly had time to adopt a valid reapportionment plan on its own initiative. The General Assembly first met in special session for this very purpose on January 6, 1971. Its new statute reapportioning the House legislative districts was enacted March 1, 1971, and was promptly attacked by this appellee through suit filed on March 5, 1971.

Four times thereafter the General Assembly reconvened its special session on reapportionment, but on each occasion declined to change its unconstitutional House of Delegates redistricting plan. When appellee's request for injunction came before the District Court on May 24, 1971, that Court entered an order postponing the scheduled June 8 primary until September 14 and giving the legislature until June 15, to act appropriately; otherwise, the Court said, it would "proceed with the trial. . . . and thereafter formulate a plan of reapportionment within the prescription of the Voting Rights Act and resolving the valid objections, if any, of the plaintiffs to the 1971 reapportionment legislation."

After this order the legislature again reconvened in early June but refused to alter its redistricting plan for the House of Delegates. Under these circumstances, and with the once postponed primary only ten weeks away, the District Court had no alternative timewise but to formulate a reapportionment plan of its own which would remove the glaring in-

equities of the statute under attack. This it did, and it is submitted that the court's opinion fully justifies the action taken.

For the reasons above mentioned, the Motion to Affirm the judgment of the District Court reapportioning the Virginia House of Delegates should be granted.

Respectfully submitted,

Clive L. DuVal, II., pro se

2000 N. 16th Street
Arlington, Virginia

CERTIFICATE

I, Clive L. DuVal, II, a member of the Bar of the Supreme Court of the United States, and one of the appellees herein, hereby certify that three (3) copies of the foregoing Motion to Affirm were on this 8th day of October, 1971, mailed to the following: Honorable Andrew P. Miller, Attorney General of Virginia, Counsel for Appellants; Supreme Court Library Building, Richmond, Virginia 23219; Stanford E. Parris, Esquire, Counsel for Plaintiffs Stanford E. Parris, et al., 4085 Chain Bridge Road, Fairfax, Virginia 22030; The Honorable Andre Evans, Commonwealth's Attorney for Virginia Beach, Counsel for Defendant members of the Electoral Board of the City of Virginia Beach, Princess Anne Station, Virginia Beach, Virginia 23456; The Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, Counsel for Defendant members of the Electoral Board of the City of Norfolk, P.O. Box 1531, Norfolk, Virginia 23501; The Honorable R. F. Horan, Jr., Commonwealth's Attorney of Fairfax County, Counsel for Defendant members of the Electoral Board of Fairfax County, Fairfax, Virginia 22030; The Honorable Gordon B. Tayloe, Jr., Assistant City Attorney of the City of Norfolk, Counsel for Defendant-Intervenor City of Norfolk, 908 City Hall Building, Norfolk, Virginia 23501; The Honorable J. Dale Bimson, City Attorney of

Virginia Beach, Municipal Center, Virginia Beach, Virginia 23456; John Ashton, Esquire, Counsel for Defendant-Intervenor City of Virginia Beach, Hunton, Williams, Gay, Powell and Gibson, P.O. Box 1535, Richmond, Virginia 23212; The Honorable Henry E. Howell, Jr., Counsel for Plaintiff Henry E. Howell, Jr., et al., 808 Maritime Tower, Norfolk, Virginia 23510; Henry L. Marsh, III, Esquire, Hill, Tucker and Marsh, Counsel for Plaintiff-Intervenors William S. Thornton, et al., 214 East Clay Street, Richmond, Virginia 23219, and C. V. Spratley, Jr., Counsel for Defendant-Intervenor Lewis A. McMurran, Jr., P. O. Box 575, Newport News, Virginia 23607; and to Robert L. Weinberg, Esquire, 1000 Hill Building, Washington, D. C. 20006, and C. Stanley Dees, Esquire, 314 North Pitt Street, Alexandria, Virginia 22314, plaintiffs who have filed separate notices of appeal. All parties required to be served have been served.

CLIVE L. DUVAL, II
Appellee pro se

In The

Supreme Court of the United States

October Term, 1971

No. 71-373

CITY OF VIRGINIA BEACH, *Appellant,*

v.

HENRY E. HOWELL, JR., ET AL., *Appellees.*

and

CITY OF VIRGINIA BEACH, *Appellant,*

v.

STANFORD E. PARRIS, ET AL., *Appellees.*

and

CITY OF VIRGINIA BEACH, *Appellant,*

v.

CLIVE L. DuVAL, II, ET AL., *Appellees.*

On Direct Appeal from the United States District Court for the Eastern District of Virginia

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Of all the parties to this case only the City of Norfolk, which was also an intervenor below, has voiced any objection to the review of the court ordered reapportionment plan sought by Virginia Beach in its Jurisdictional Statement. Pursuant to Rule 16(4) of this Court, Virginia Beach submits the following comments in response to Norfolk's Motion to Dismiss.

ISSUES ON APPEAL

While a party to the ordinary lawsuit is customarily considered to be bound by the issues raised in his pleadings, this rule of thumb has no place here. Norfolk was able to cite only a legal encyclopedia for the irrelavant dictum that a plaintiff must conform his proof at trial to the cause of action set forth in his complaint. 41 AM. JUR. *Pleading* § 374 (1942). Norfolk disregards that the court ordered plan now appealed from bears little resemblance to the plan before the District Court when Virginia Beach intervened. Its avowed purpose for intervening was to defend the procedure employed in the 1970 census for counting Navy and Coast Guard personnel at the home port of their assigned ships.

As an intervenor, Virginia Beach unquestionably has the right to appeal from that portion of the District Court's interlocutory order which rewrote the city's representation and so drastically affected it and its citizens. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); 3B *Moore's Federal Practice*, § 24.15 at 566 (1969). And Virginia Beach is certainly not limited in this Court to the same arguments advanced by it in the court below. *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). Moreover, the portion of the District Court's order which affects Virginia Beach—the inclusion of 29,136 Virginia Beach citizens in Norfolk's seven-member 39th House District—was not a remedy sought by any of the parties. Nor was it ever mentioned or considered during trial of the case.

NOTICE OF CONSTITUTIONAL DEFECTS

It is not true, as Norfolk contends, that the General Assembly was on notice of constitutional defects in its reapportionment plan and therefore should have revised it before the District Court handed down its holding on July

2, 1971. Self serving arguments below by Senator Henry E. Howell, Jr., plaintiff in one case, and Delegate James M. Thompson, intervenor in another, that they had been unable to persuade the General Assembly to correct *allegedly* unconstitutional defects in its plan prove nothing.

As pointed out in the Jurisdictional Statement at 16, judicial intervention in the reapportionment process is appropriate only after the legislature has been given an "adequate opportunity" to prepare a constitutional plan. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964). In virtually every case the "adequate opportunity" accorded a legislature has followed a judicial determination that a particular apportionment plan was unconstitutional. See cases cited in Jurisdictional Statement at 15.

The General Assembly was entirely justified in awaiting the District Court's decision on the constitutional issue. The United States Attorney General had withdrawn his objection to the plan and the District Court gave no hint that it considered the plan unconstitutional in any other respect. There was at least as much reason to believe that the District Court would approve the General Assembly's plan as there was to think it would not.

THE PATENT UNFAIRNESS OF THE DISTRICT COURT'S PLAN

Virginia Beach does not advocate the transfer of citizens from Norfolk to Virginia Beach or from Virginia Beach to Norfolk. But if political boundaries must be ignored in favor of mathematical equality, the transfer of citizens from one political subdivision to vote with those of another must be made in a fair and logical way.

The District Court sought to achieve mathematical equality by placing 29,000 Virginia Beach citizens in Norfolk's seven-member house district and leaving the remaining citizens of Virginia Beach in a three-member district.

Fairness and logic require that if any transfer was necessary, 17,000 Norfolk citizens be transferred to a four-member district for the rapidly growing City of Virginia Beach. What the court did was even more unfair when it is recalled that 40,000 citizens of Virginia Beach are also included in Norfolk's three-member senate district. Norfolk makes no attempt in its Motion to Dismiss to justify why so many citizens of Virginia Beach must vote with the entire population of Norfolk in elections for *both* House and Senate. Such inequalities cannot be justified.

CONCLUSION

The City of Norfolk has failed to discredit any of the arguments advanced by Virginia Beach in its Jurisdictional Statement. While pointing out that the remedial powers of the District Court are discretionary, Norfolk has not suggested any reasons why the abuses of discretion cited in the Jurisdictional Statement do not constitute reversible error. Moreover, discretion is entirely irrelevant to consideration of the constitutional arguments made by Virginia Beach. The City of Virginia Beach respectfully requests that the Motion to Dismiss be denied.

Respectfully submitted,

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Municipal Center
Virginia Beach, Virginia 23456

JOHN B. ASHTON
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Of Counsel

HARRY FRAZIER, III
HUNTON, WILLIAMS, GAY,
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700 East Main Street
Richmond, Virginia 23219
Counsel for Appellant

Dated: November 18, 1971.

CERTIFICATE OF SERVICE

I, Harry Frazier, III, counsel for the City of Virginia Beach and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief in Opposition to Motion to Dismiss in the United States Mails, first class postage prepaid, this 18th day of November, 1971, addressed to The Honorable Andrew P. Miller, Supreme Court Building, Richmond, Virginia 23219; James M. Thomson, Esquire, P. O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esquire, 1425 H Street, N.W., Suite 822, Washington, D. C. 20005; Stanford E. Parris, Esquire, 4085 Chain Bridge Road, Fairfax, Virginia 22030; C. Stanley Dees, Esquire, 314 North Pitt Street, Alexandria, Virginia 22314; Robert L. Weinberg, Esquire, 1000 Hill Building, Washington, D. C. 20006; The Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, P. O. Box 1531, Norfolk, Virginia 23501; The Honorable R. F. Horan, Jr., Commonwealth's Attorney of Fairfax County, Fairfax, Virginia 22030; The Honorable Gordon B. Tayloe, Jr., Assistant City Attorney, Norfolk, Virginia, 908 City Hall Building, Norfolk, Virginia 23501; The Honorable Henry E. Howell, Jr., 808 Maritime Tower, Norfolk, Virginia 23510; The Honorable Peter K. Babalas, 210 Rotunda Building, Norfolk, Virginia 23510; The Honorable Henry L. Marsh, III, Hill, Tucker and March, 214 East Clay Street, Richmond, Virginia 23219; Armand Derfner, Esquire, 520 Woodward Building, 733 15th Street, N.W., Washington, D. C. 20005; Benjamin W. Dulany, Esquire, 822 Southern Building, Washington, D. C.; C. V. Spratley,

Jr., Esquire, P. O. Box 575, Newport News, Virginia 23607; and The Honorable David L. Norman, Acting Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D. C. 20530.

HARRY FRAZIER, III
Counsel for the City of Virginia Beach

FILE COPY

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. A-83 71-373

CITY OF VIRGINIA BEACH,
Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

No. A-84 71-364

JOAN S. MAHAN, ET AL.,
Appellants,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

MOTION TO AFFIRM SUBMITTED BY APPELLEES

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Counsel for the Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. A-83

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,

Appellees.

No. A-84

JOAN S. MAHAN, ET AL.,

Appellants,

v.

HENRY E. HOWELL, JR., ET AL.,

Appellees.

MOTION TO AFFIRM SUBMITTED BY APPELLEES

Appellees Henry E. Howell, Jr., et al, pursuant to Rule 16 of this Court, move that the interlocutory order and decree of the three judge District Court for the Eastern District of Virginia herein appealed from be affirmed as to the Senate of Virginia reapportionment plan on the ground that the question is so insubstantial as not to require further argument.

ARGUMENT

The action of the District Court in reapportioning the Senate of Virginia was plainly right and compelled by the uncontradicted and undisputed evidence before that Court

together with the clear requirements as to fair and equal representation pursuant to the Fourteenth Amendment of the Constitution of the United States as enunciated in the decisions of this Court.

It is important to appreciate the limited nature of the District Court's revision of the Senate reapportionment plan as enacted by the Virginia General Assembly. The Senate of Virginia is comprised of forty members, and the plan enacted by the General Assembly provided forty single-member districts. The District Court changed this plan only by consolidating the Fifth, Sixth and Seventh Senatorial Districts into one multi-member district from which three Senators are elected at large. Based on the total population, each of Virginia's forty Senators should ideally represent 116,212 persons. Since the new multi-member district has a population of 348,146, each of the three Senators represents 116,048 persons, only a miniscule variation from the ideal.

The undisputed evidence compelled the District Court to consolidate the Fifth, Sixth and Seventh Senatorial Districts into one multi-member district. Under the reapportionment plan enacted by the Virginia General Assembly, the Fifth and Sixth Senatorial Districts lay wholly within the boundaries of the City of Norfolk; the Seventh District was comprised of the balance of Norfolk's geographical area plus a contiguous area of the City of Virginia Beach. Based on the placement of Federal Census tracts within this total area, the three single districts created by the Virginia General Assembly were numerically equal, but the evidence before the District Court established without question that the *actual population* of each of the three districts was substantially unequal with the result that residents of the Fifth District would be over-represented and residents of the Sixth and Seventh Districts would be under-represented in comparison with the ideal representation of 116,212 persons per Senator.

This malapportionment struck down by the District Court arose from the treatment by the U.S. Census Bureau of naval personnel assigned to ships. The United States Naval

Station in Norfolk is recognized to be the largest naval installation in the world. It lies wholly within the former Fifth Senatorial District. It is the headquarters for the United States Atlantic Fleet and a vast number of naval vessels are "home-ported" there. The naval and other personnel who actually reside on the U.S. Naval Station were assigned to a particular Census Tract with finite geographical boundaries; there was and is no controversy among the parties that the persons enumerated in that Census Tract were, in fact, residents and part of the population for purposes of apportionment of the former Fifth Senatorial District. However, the entire 36,693 naval personnel assigned to vessels home-ported at the Norfolk Naval Station were enumerated in a separate Census Tract, a "tract" without any geographical boundaries. Though 18,000 of these naval personnel live *outside* the boundaries of the former Fifth Senatorial District, but within the boundaries of the former Sixth and Seventh Senatorial Districts, all 36,693 were arbitrarily assigned by the Virginia General Assembly as part of the *population* of the Fifth Senatorial District. It is emphasized that the appellants herein do not now and did not before the District Court dispute this evidence that 18,000 of these "home-ported" naval personnel actually reside outside the Fifth but within the Sixth and Seventh Senatorial Districts.

Therefore, based on this undisputed evidence, the *actual population* of the original Fifth Senatorial District is only 98,084, i.e. 18,000 persons less than the 116,084 erroneously computed by the General Assembly. Similarly, since the 18,000 naval personnel arbitrarily counted by the General Assembly in the Fifth District in fact were shown by the evidence to reside in and be a part of the population of the Sixth and Seventh Districts, the actual population of each of those districts is clearly substantially greater than the 116,103 and 115,959, respectively, computed to be the population by the General Assembly.

Had the Fifth, Sixth and Seventh Senatorial Districts been allowed to stand, the result would have been inescapably unconstitutional legislative apportionment and violation of the guarantee of equal protection of the laws afforded by the Fourteenth Amendment of the United States Constitution. The populace of the Fifth Senatorial District would have been over-represented and the populace of the Sixth and Seventh Districts would have been under-represented. The significant deviations from the ideal as shown by the uncontradicted evidence were unjustified by the appellants before the District Court and cannot be justified. Article II, Section 6 of the Constitution of Virginia commands that the General Assembly in establishing its legislative districts to provide for "representation in proportion to the *population* of the district". (Emphasis added.) In establishing the Fifth, Sixth and Seventh Senatorial Districts as single-member districts, the General Assembly arbitrarily disregarded the *actual population* of each of these districts, by disregarding the presence and distribution of home-ported naval personnel within the area comprising the three Senatorial districts. As noted by the District Court, this Court taught in *Davis* v. *Mann*, 377 U.S. 678, 691 (1964), that it is constitutionally impermissible to ignore the presence of military personnel for the purpose of legislative redistricting.

Next, the suggestion by appellants in their jurisdictional statement that the District Court acted precipitously in ordering reapportionment of the Senate of Virginia by creating one three-member district from the former Fifth, Sixth and Seventh Districts, without first giving the General Assembly an opportunity to correct the reapportionment plan, is simply unfounded. When the District Court entered judgment on July 2, 1971, the Special Session of the Virginia General Assembly for the limited purpose of reapportionment of its legislative districts had continued since January 6, 1971. During that time, the very evidence regarding the actual population distribution of home-ported naval personnel, which was

presented before the District Court, had been extensively presented to the General Assembly through the offices of two of your appellees herein, Henry E. Howell, Jr. and Peter K. Babalas, members of the Senate of Virginia from Norfolk. The General Assembly did not contradict or heed that evidence and cannot now criticize the District Court for correcting the malapportionment which resulted from its disregard.

With regard to the appellant City of Virginia Beach, it is noted that that appellant, as an intervenor-defendant in the District Court, intervened for the limited purpose of maintaining Bureau of Census Population figures unchanged as they related to certain Federal and State Funds granted to the City of Virginia Beach. As appears from the face of its Interlocutory Order, the District Court has in no way invalidated the use of Bureau of Census Population figures with regard to grants of Federal and State Funds. Therefore, there is no substantial question raised herein with regard to the appellant City of Virginia Beach.

CONCLUSION

From the foregoing it is clear that the judgment of the District Court was plainly right, based on the law and the evidence, and hence this Motion to Affirm that judgment of the District Court reapportioning the Senate of Virginia should be granted without further argument.

Respectfully submitted,

Henry E. Howell, Jr.
Counsel pro se and for his
Co-Appellees, Peter K.
Babalas, Angeline V.
Fitzpatrick, Reverend
Lawrence L. Craig and
William K. Beach

Henry E. Howell, Jr.
Howell, Anninos & Daugherty
808 Maritime Tower
Norfolk, Virginia 23510

CERTIFICATE

I, Henry E. Howell, Jr., a member of the Bar of the Supreme Court of the United States, one of the appellees herein and counsel for appellees Henry E. Howell, Jr., Peter K. Babalas, Angeline K. Fitzpatrick, Reverend Lawrence L. Craig and William K. Beach, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Motion to Affirm, in the United States Mails, first class postage prepaid, this 2nd day of February, 1972, addressed to The Honorable Andrew P. Miller, Attorney General of Virginia, The Honorable Vann H. Lefcoe and The Honorable Anthony F. Troy, Assistant Attorneys General of Virginia, Counsel for Defendants/Members of the State Board of Elections, Supreme Court-Library Building, Richmond, Virginia 23219; James M. Thomson, Esquire, Plaintiff-Intervenor *pro se* P. O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esquire, Counsel for Plaintiffs Clive L. DuVal, II, et al., 1425 H. Street, N.W., Suite 822, Washington, D. C. 20005; Stanford E. Parris, Esquire, Counsel for Plaintiffs Stanford E. Parris, et al., 4085 Chain Bridge Road, Fairfax, Virginia 22030; The Honorable Andre Evans, Commonwealth's Attorney for Virginia Beach, Counsel for Defendant members of the Electoral Board of the City of Virginia Beach, Princess Anne Station, Virginia Beach, Virginia 23456; The Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, Counsel for Defendant members of the Electoral Board of the City of Norfolk, P. O. Box 1531, Norfolk, Virginia 23501; The Honorable R. F. Horan, Jr., Commonwealth's Attorney of Fairfax County, Counsel for Defendant members of the Electoral Board of Fairfax County, Fairfax, Virginia 22030; The Honorable Gordon B. Tayloe, Jr., Assistant City Attorney of the City of Norfolk, Counsel for Defendant-Intervenor City of Norfolk, 908 City Hall Building, Norfolk, Virginia 23501; The Honorable J. Dale Bimson, City Attorney of Virginia Beach, Counsel for Defendant-Intervenor City of Virginia Beach, Municipal Center, Virginia Beach, Virginia

23456; Harry Frezice, III, Esquire, and John Ashton, Esquire, Counsel for Defendant-Intervenor City of Virginia Beach, Hunton, Williams, Gay, and Gibson, P. O. Box 1535, Richmond, Virginia 23212; Clive L. DuVal, II, Esquire, Appellee *pro se*, 2000 N. 15th Street, Arlington, Virginia 22216; Henry L. Marsh, III, Esquire, Hill, Tucker and Marsh, Counsel for Plaintiff-Intervenors William S. Thornton, et al., 214 East Clay Street, Richmond, Virginia 23219; and C. V. Spratley, Jr., Counsel for Defendant-Intervenor Lewis A. McMurran, Jr., P. O. Box 575, Newport News, Virginia 23607; and to Robert L. Weinberg, Esquire, 1000 Hill Building, Washington, D. C. 20006, and C. Stanley Dees, Esquire, 314 North Pitt Street, Alexandria, Virginia 22314, plaintiffs who have filed separate notices of appeal.

/s/ Henry E. Howell, Jr.

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Supreme Court of the United States

October Term, 1971

No. 71-364

JOAN S. MAHAN, Secretary, State Board of Elections, et al.,
Appellants,

v.

HENRY E. HOWELL, JR., et al.,
Appellees.

EDGAR A. PRICHARD, Member, State Board of Elections, et al.,
Appellants,

v.

CLIVE L. DUVAL, 2D, et al.,
Appellees.

EDGAR A. PRICHARD, Member, State Board of Elections, et al.,
Appellants,

v.

STANFORD E. PARRIS, et al.,
Appellees.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANTS AND BRIEF IN OPPOSITION TO APPELLEE HOWELL'S MOTION TO AFFIRM

PRELIMINARY STATEMENT

Appellants file this Supplemental Brief pursuant to the provisions of Rule 16(5) of the Rules of the Supreme Court to direct the Court's attention to the case of *Sims* v. *Amos* decided on January 3, 1972, by the United States District Court for the Middle District of Alabama. Such case is set forth in the appendix hereto and was not available at the

time of the filing of Appellants' Jurisdictional Statement, which statement is presently pending before the Court.

Additionally, appellants have received the Motion to Affirm filed by Appellee Howell subsequent to the time directed by this Court for submission of such brief. In accordance with the provisions of Rule 16(4) of the Supreme Court Rules, appellants oppose such Motion and set forth herein the reasons for such opposition.

ARGUMENT

I.

A cursory reading of the *Sims* decision pointedly emphasizes the dichotomy between a judicial decision of constitutional issues regarding reapportionment litigation and the anomalous decision in the instant suit constituting an unwarranted flex of judicial muscle.

The entire opinion of the Virginia District Court is summed up in their last statement. The courts' decision does not "judicially" opine but simply "legislatively" redraws districts with the blithe announcement that their apportionment "is the best [they] can devise."

An important consideration which this Court should bear in mind is that the instant cases arise from attacks on legislative districts devised by the General Assembly of Virginia in accordance with the mandate of Article II, Section 6, of the newly revised Constitution of Virginia, effective July 1, 1971.

In fact the very same General Assembly approved the constitutional amendment requiring reapportionment in 1971 rather than in 1972, which would have been the case if the provisions of the old Constitution (requiring redistricting in 1932 and every ten years thereafter) were carried

forward. In this manner, the 1971 general elections for both house seats (two year terms) and senate seats (four year terms) would be conducted in newly created electoral district, and the edict of one man—one vote would be safeguarded for almost the entire decade of the seventies.

This was not a case arising, as was *Sims*, from a legislature's lack of adherence to the command of its own state constitution. It was not a case arising, as was *Sims*, from a seventh decade of inaction in the legislative reapportionment field; in fact Virginia has continuously dedistricted decennially and by faithfully following the mandate of her Constitution ranked eighth in the United States in fairness of representation based solely upon population, prior to 1961 when the major reapportionment decisions were rendered by this Court. *Davis* v. *Mann*, 377 U.S. 678, 12 L.ed.2d 609, 84 S.Ct. 1453 (1964).

The Alabama District Court in *Sims* studiously set forth the history of Alabama redistricting; carefully justifying its intervention into a legislative responsibility. It emphasized:

> "This Court always has recognized that the primary responsibility for reapportionment rests with the Legislature and that no action on the part of this Court, which is not absolutely essential for the protection of plaintiffs' constitutional rights, should be taken before the Legislature of Alabama has had a reasonable opportunity to comply with its duty. *Sims* v. *Frink*, 208 F.Supp. 431 (M.D. Ala. 1962). Indeed, the history of the present litigation reflects a trend of protracted judicial restraint, this Court acting only when confronted with totally inadequate legislative responses to, or complete disregard by the Legislature for, its constitutional mandate. The following is a cursory survey of that history."

The Court then proceeded to outline the legislative responses to redistricting orders, and only then, by showing the inadequacy of such response, did it justify enacting its own plan; a plan promulgated by the plaintiffs, upon which defendants had ample opportunity to comment. The justified protracted judicial restraint of the Alabama District Court stands in stark contrast to the actions of the Virginia Court. Indeed a comparison is most appropriate.

Faced with no defense but only with a concession as to malapportionment, the Alabama Court rejected the state's request that, given more time, they would effect the required reapportionment. It is felt appropriate that such reasons for rejection be set forth herein at length:

> "Although the Constitution of Alabama required the Legislature to reapportion in accordance with the latest available federal census, prior to the initiation of the present litigation in 1961, *Sims* v. *Frink*, the last time the Legislature had reapportioned was in 1901. Sixty years and six decennial federal enumerations of the population of Alabama had passed without the Legislature having adhered to the command of its own State's Constitution. Nevertheless, in 1962, when plaintiffs in *Sims* sought an interlocutory injunction prohibiting defendants from holding primary elections in the malapportioned districts, this Court acknowledged the primacy of the Legislature's role in reapportionment and, although it retained jurisdiction, refused to issue the injunction, stating, '[t]here [still] is time [before the general election] for the Legislature of Alabama to comply with its duty. . . .' But having been afforded this additional reasonable opportunity to provide a fair and proper reapportionment, the Alabama Legislature again failed to remedy the 'invidious discrimination' ingrained in the apportionment of the State's legislative districts. At that time this Court would have been justified in instituting a complete re-

apportionment plan of its own. Instead, however, recognizing the delicate relationship between federal courts and state legislatures, this Court effected only the minimum changes considered necessary to release the 'stranglehold' on the Legislature and to permit it to reapportion itself in time to conduct the 1966 election of Alabama legislators. In this connection it was observed:

> 'The Court hopes that the moderate steps taken by this order may be enough to break the stranglehold. They certainly will not suffice as any permanent reapportionment. If they should prove insufficient to break the stranglehold, the Court remains under the solemn duty to relieve the plaintiffs and other citizens like situated from further denial of the equal protection of the laws. That much must be accomplished before there can be a final disposition of this case.'

"208 F. Supp. at 442.

"Again jurisdiction of the case was expressly retained, and after the United States Supreme Court, in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), affirmed this Court's action, it remanded the case for further proceedings, specifically directing this Court 'to take some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim . . . ,' that is, in time to be used as the basis for conducting the 1966 election of State legislators. Subsequent to that decision, and because the Legislature again had failed to reapportion itself, this Court, in July of 1965, ordered the parties in *Sims* to file 'their proposals for a judicial remedy designed to eliminate the "invidious discrimination" presently existing in both Houses of the Legislature. . .' Thereafter, the Alabama Legislature convened in special session and enacted bills to reapportion both the Senate and the House of Representatives. This Court accorded each of those acts 'the most care-

ful scrutiny and consideration,' focusing on the constitutional prerequisite that reapportionment must be substantially on a population basis. *Reynolds* v. *Sims*, 377 U.S. at 568; Alabama Const. art. 5, § 200 (1901). In its decision, filed on October 2, 1965, this Court adopted the multi-member district senatorial scheme of the Legislature, but, because it found the Legislature's House plan discriminatory against Negroes, it provided an alternative plan of multi-member House of Representative districts. *Sims* v. *Baggett, supra.* This Court retained jurisdiction and ordered that:

> '. . . the apportionment of the Alabama Legislature as herein ordered remained in effect without change, except by order of this Court, until the Legislature of the State of Alabama reapportions itself . . . after the next decennial census to be conducted in 1970. . . .' [Unpublished decree.]

"The next chapter in the development of the present litigation began in January of 1970, when certain 'Negro-Americans' residing in the 'predominantly Negro ghetto areas' of Montgomery, Mobile and Jefferson Counties filed a class action seeking preliminary and permanent injunctions against the election of State legislators from these three counties on a county-at-large basis. Plaintiffs contended that multi-member districting operated to minimize and cancel out their voting strength to the extent that they were deprived of equal protection of the laws and of the rights guaranteed them by the Fifteenth Amendment to the United States Constitution. Although this Court refused to issue a preliminary injunction because 'it would be unreasonable and unwise to require any legislative reapportionment prior to the time fixed in [*Sims* v. *Baggett*], that is prior to the first legislative session following the completion of the 1970 decennial census,' this Court did order that jurisdiction be retained, that a hearing on the merits be postponed and that defendants' motions to be dismissed be denied. In so ordering,

the Court commented upon the merits of plaintiffs' complaint:

> '. . . In our opinion, however, the evo evidence offered in support of the plaintiffs' claims, if such evidence is substantiated by the 1970 decennial census and by the further evidence then available, makes out a strong case for the consideration of the Legislature of Alabama.'

"*Nixon* v. *Brewer*, 49 F.R.D. 122, 126 (M.D. Ala. 1970).

"Following this order and the ensuing completion of the 1970 census, several events occurred in rapid succession. First, in June of 1971, plaintiff Peters filed a class action in the Northern District of Alabama, asking that the State Legislature be reapportioned and that mid-term elections be held. On July 12, plaintiffs in *Nixon* and *Sims* filed a motion for consolidation and asked for relief similar to that requested in *Peters*. Ten days later this Court granted the motion to consolidate and issued an order requiring defendants to show cause why the Legislature was not under a mandatory constitutional duty to reapportion and if the Legislature should fail to perform its duty, why this Court would not then be under a duty to reapportion the Legislature constitutionally. On September 20, 1971, *Peters* was consolidated with *Sims* and *Nixon*.

"Despite this Court's observation in *Nixon* v. *Brewer* that plaintiffs' complaint made out a strong case, despite the 1970 census' clearly substantiating plaintiffs' claims, and despite the events set out above, the 1971 General Session of the Alabama Legislature adjourned without having met the mandates of both the Alabama and Federal Constitutions concerning reapportionment. On October 8, 1971, this Court set these three cases for hearing to commence December 2, 1971, and expressly notified the Legislature that it had until that date to enact a plan. Although the Legislature has convened since in special session, it has continued to

fail to discharge its duty. With the *Nixon* plaintiffs' amendment of November 22, 1971, which added to the prayer for relief a request for statewide single-member legislative districts, this litigation assumed its present posture. The Court proceeds, therefore, to the merits."

In contrast to the above Virginia has, as an example, faithfully and consistently redistricted in Congressional (Acts of Assembly 1891-92, p. 348; 1906, p. 40; 1912, p. 156; 1932, p. 20; 1934, p. 17; 1948, p. 802; 1952, c. 282; 1958, c. 333; 1964, c. 536; 1971, c. 118), Senatorial (1891-92, p. 56; 1901-2, p. 800; 1922, p. 463; 1934, p. 252; 1942, c. 387; 1952, c. 17; Ex. Sess. 1958, c. 333; 1962, c. 635; 1964 Ex Sess. c. 1; 1971, cc. 120, 246), and House of Delegates legislative seats (1891-92, p. 56; 1901-2, p. 800; 1922, p. 463; 1932, p. 337; 1942, c. 387; 1952, Ex. Sess., c. 18; 1958, c. 333; 1962, c. 638; 1964, Ex. Sess. c. 2; 1971, c. 116).[1]

The original redistricting litigation instituted in the Commonwealth of Virginia [*Mann* v. *Davis*, 213 F.Supp. 577 (E.D. Va. 1962)] was brought to test the validity of the then recently passed redistricting acts (1962 Acts of Assembly cc. 635, 638), not to cure inaction.

Upon this Court's decision in *Davis* v. *Mann*, *supra*, the General Assembly of Virginia immediately in extra session (1964 Acts of Assembly Ex. Sess. cc. 1, 2) passed new redistricting acts, varying significantly from the minimal changes of the 1962 acts, which 1964 acts were approved

[1] Though some may argue that the General Assembly was not consistent, since it adjourned in 1952 without redistricting, (it did enact a congressional plan) the mandate of the Commonwealth's Constitution was nevertheless met through the executive branch, convening a special session wherein the legislature, not the executive or judicial branches of government, adopted a reapportionment scheme for House of Delegate and Senatorial legislative seats.

by this Court. *Mann.* v. *Davis,* 245 F. Supp. 241 (E.D. Va. 1965) aff. 382 U.S. 42, 15 L.ed.2d 35, 86 S.Ct. 181 (1965).

Really, the courts in Virginia have never been confronted, as was the Alabama Court in 1966, with no alternative, except to design a judicial remedy. And even in 1966, the Alabama Court, faced with such a dilemma requested and sought proposals for redistricting.

In 1971, the instant suit, as in 1963, was brought to test the validity of the new redistricting, not, as in Alabama, to prohibit malapportionment due to inaction. As previously indicated the 1971 Acts were purposly passed to achieve proper representation for the greatest length of time possible in the decade of the seventies.

Further the General Assembly at its 1971 session never adjourned but recessed until the validity of its reapportionment acts could be fully tested. The one admonition given by the District Court—to correct the objections the Attorney General interposed under the Voting Rights Act of 1965, 42 U.S.C. 1973, *et seq.*—was quickly met. The Attorney General's objections to the lack of single member districts in House seats of five major cities, which objections were based upon the Indiana District Court's decision of *Chavis* v. *Whitcomb,* 305 F. Supp. 1364 (S.D. Ind. 1969), were soon mooted, and thus rightly withdrawn, when this Court announced its reversal of such holding. *Whitcomb* v. *Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.ed.2d 363 (1971).

The Attorney General's objection to one of the lines in the single member Senatorial districts dividing the City of Norfolk, Virginia, was immediately cured by action of the General Assembly in order that prompt elections could be effectuated. See, 1971 Acts, c. 246; Attorney General's approval Joint Appendix p. 54.

It must be emphasized that the action by the General

Assembly was taken despite well reasoned authority that the Attorney General (who had not as yet promulgated rules and requirements for submissions) had interposed an untimely objection. See, *Vinik* v. *Smyth*, ... F. Supp. ..... (Ariz. 1971) attached hereto as an appendix.

The arguments by some that the General Assembly should have cured all complaints fail to realize, as this Court must realize, and as appellees apparently cannot realize, that redistricting cannot please all political elements and individuals of a state. Complaints will be had from many areas. The General Assembly cannot fulfill its duty to the people by trying to amend the act to moot every complaint, and was more than justified in following the order of the lower court with regard to mooting only the objections of the Attorney General and in awaiting the decision of such court as to the constitutional issues raised by appellees. It is regretful that such a wait was for naught and that the District Court never informed the General Assembly in what manner the legislative redistricting acts could be restructured but merely announced its own restructuring.

The lower court in fact never really ruled on the constitutional issues presented, but looked upon the whole litigation as a culmination in "judicial" redistricting. The necessity, (if the three branches of coordinate government are to properly function) of providing "the Virginia Legislature with an adequate opportunity to enact a valid plan," as mandated by this Court in *Davis* v. *Mann, supra,* was spurned. Clearly the absence in Virginia, of the justification as outlined in *Sims* emphasizes the error of the Virginia Court, and requires reversal.

II.

The motion to affirm, filed by appellee Howell, deceivingly obfuscates the real issue presented by the lower court's ruling as to the Senate seats in the City of Norfolk, and thus such motion should not be granted.

Appellants have set forth, in their Jurisdictional Statement, the need for this Court to review the unprecedented ruling of the District Court which in fact held that census enumeration could not be utilized by the Commonwealth in redistricting unless the Commonwealth abandoned her legislative prerogative of choosing between single member and multi-member districts, utilizing the latter.

Appellee Howell skillfully represents to this Court that nothing unprecedented occurred by the Court's ruling and that the ruling merely flowed logically from "uncontradicted and undisputed evidence."

The Bureau of Census enumerated approximately 50,000 individuals at the United States Naval Station at Norfolk. It is imperative to remember that such enumeration was not from a sample survey, but from an actual count. Of these individuals approximately 14,000 were stationed physically on land at the base. As appellee indicates there is not any controversy as to those individuals. The remaining 36,693 were enumerated aboard the ship upon which they were stationed, such ships being "home ported" at the Naval station. And herein lies the controversy. The entire Naval station was placed in the Fifth Senatorial District. Since there were no geographical boundaries to the tract containing the enumeration of individuals on home-ported vessels such enumeration, as conceded by appellee, could not be divided. Appellee charges, that though enumerated aboard vessels, many individuals lived elsewhere and that

undisputedly "18,000 of these 'home-ported' naval personnel actually reside outside the Fifth but within the Sixth and Seventh Senatorial Districts"—the districts consolidated by the Court. Such statement is totally inaccurate. Appellee showed, not by actual count but only by a sample housing survey, utilizing zip codes, that of the 36,693, "59% or approximately 21,600 of said personnel maintain local residences outside the Fifth Senatorial District." See, Plaintiff's Exhibit No. 9, Affidavit of Professor T. J. Reed.

Thus the first part of the quoted conjunctive sentence is true. The second part however is untrue and deceptive. Appellees' own sample survey demonstrated that of the 21,600 approximately 48% or over 9,000 individuals maintained residence outside the Fifth, Sixth or Seventh Senatorial Districts.

Consequently, what appellee fails to come to grips with is that the "actual population" of the Fifth, Sixth and Seventh Senatorial Districts cannot be so matter-of-factly computed.

The General Assembly did realize this and in coming to grips with the problem justifiably concluded that the enumeration by the Bureau of Census was not on an arbitrary basis. See deposition, Dr. Taeuber. Sailors were counted at the place with which they were most identified and consequently the place where they, in the General Assembly's opinion, needed representation.

Appellees' true concept of one man-one vote is that all legislators should represent an equal number of *voters.* It is *people,* however, who are represented, and the lower court, by ignoring the evidence, ignored over 9,000 people and further ignored and made impossible the type of representation legislatively determined by the General Assembly—single member districts, in one house (Senate) and a

balancing, by maintenance of political subdivisions, in the other house—a plan recommended and approved by this Court in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed.2d 506 (1964).

Respectfully submitted,

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CERTIFICATE

I, Anthony F. Troy, Assistant Attorney General of the Commonwealth of Virginia, a member of the bar of the Supreme Court of the United States, and one of counsel for appellants, do hereby certify that a copy of the foregoing Supplemental Brief on Behalf of Appellants and Brief in Opposition to Appellee Howell's Motion to Affirm was on this the 25th day of February, 1972, mailed to James M. Thomson, Esquire, Plaintiff-Intervenor pro se, P.O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esquire, Counsel for Plaintiffs Clive L. DuVal, II, et al., 1425 H Street, N.W., Suite 833, Washington, D.C. 20005; Stanford E. Parris, Esquire, Counsel for Plaintiffs Stanford E. Parris, et al., 4085 Chain Bridge Road, Fairfax, Virginia 22030; The Honorable Andre Evans, Commonwealth's Attorney for Virginia Beach, Counsel for Defendant members of the Electoral Board of the City of

Virginia Beach, Princess Anne Station, Virginia Beach, Virginia 23456; The Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, Counsel for Defendant members of the Electoral Board of the City of Norfolk, P.O. Box 1531, Norfolk, Virginia 23501; The Honorable R. F. Horan, Jr., Commonwealth's Attorney of Fairfax County, Counsel for Defendant members of the Electoral Board of Fairfax County, Fairfax, Virginia 22030; The Honorable Gordon B. Tayloe, Jr., Assistant City Attorney of the City of Norfolk, Counsel for Defendant-Intervenor City of Norfolk, 908 City Hall Building, Norfolk, Virginia 23501; The Honorable J. Dale Bimson, City Attorney of Virginia Beach, Counsel for Defendant-Intervenor City of Virginia Beach, Municipal Center, Virginia Beach, Virginia 23456; John Ashton, Esquire, Counsel for Defendant-Intervenor City of Virginia Beach, Hunton, Williams, Powell and Gibson, P.O. Box 1535, Richmond, Virginia 23212; The Honorable Henry E. Howell, Jr., Counsel for Plaintiffs Henry E. Howell, Jr. et al., 808 Maritime Tower, Norfolk, Virginia 23510; Henry L. Marsh, III, Esquire, Hill, Tucker and Marsh, Counsel for Plaintiff-Intervenors William S. Thornton, et al., 214 East Clay Street, Richmond, Virginia 23219; and C. V. Spratley, Jr., Counsel for Defendant-Intervenor Lewis A. McMurran, Jr., P.O. Box 575, Newport News, Virginia 23607; and to Robert L. Weinberg, Esquire, 1000 Hill Building, Washington, D.C. 20006, and C. Stanley Dees, Esquire, 314 North Pitt Street, Alexandria, Virginia 22314, plaintiffs who have filed separate notices of appeal. All parties required to be served have been served.

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OPINION

Filed January 3, 1972

In The United States District Court For The Middle District of Alabama, Northern Division

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Civil Action No. 1744-N

M. O. Sims, et al.,

Plaintiffs,

R. E. Farr, et al.,

Intervening Plaintiffs,

United States of America,

Plaintiff and Amicus Curiae,

vs.

Mabel Amos, Secretary of State of the State of Alabama, et al.,

Defendants,

Pierre Pelham, et al.,

Intervening Defendants.

Civil Action No. 3017-N

App. 2

E. D. Nixon, et al.,

Plaintiffs,

Alabama Independent Democratic Party, a corporation,

Plaintiff-Intervenor,

vs.

George C. Wallace, as Governor of the State of Alabama, et al.,

Defendants,

Pierre Pelham, et al.,

Intervening Defendants.

Civil Action No. 3459-N

J. Elbert Peters, individually, for himself, and for all others similarly situated,

Plaintiff,

vs.

George C. Wallace, as Governor of the State of Alabama, et al.,

Defendants,

Pierre Pelham, et al.,

Intervening Defendants.

Before Rives, Circuit Judge, and Thomas and Johnson, District Judges.

Per Curiam:

This litigation consists of three consolidated cases, each presenting the same or similar questions of law and fact. In each case the plaintiffs[1] as citizens of the United States and of the State of Alabama, and as duly qualified and registered voters in Alabama and in various counties thereof, jointly and severally bring this action in their own behalf and in behalf of all other voters in Alabama who plaintiffs claim are denied the right of free and equal suffrage and of equal protection of the laws.[2]

In all three cases, the defendant Mabel Amos is sued in her capacity as Alabama's Secretary of State and as a State constitutional officer charged by law with certain duties and responsibilities in connection with the election of members of the Alabama Legislature. In *Sims* and *Nixon,* William J. Baxley is sued as Alabama's Attorney General, in which capacity he also is charged with performing certain functions in relation to the nomination and election of members of the Alabama Legislature; and in *Nixon* and *Peters,* George C. Wallace is sued as Governor of Alabama, the State officer charged with enforcing the Constitution and laws of the State. In *Nixon,* the Democratic Party of Alabama is a named defendant, while in *Sims* other defendants are named as follows: Defendants Harrell Hammonds,

[1] The term "plaintiffs" will be used throughout this opinion to include the original plaintiffs in each case and all intervening plaintiffs. The term "defendants" likewise will be used to include the original defendants and all intervening defendants. By an order made and entered July 27, 1965, in C.A. No. 1744-N, the United States was designated to appear and participate as a party and as amicus curiae.

[2] More specifically, the named plaintiffs in *Sims* are residents of Jefferson County; the named plaintiffs in *Nixon* are "Negro-Americans" residing in the "predominantly Negro ghettos" of Jefferson, Mobile and Montgomery Counties; and the named plaintiff in *Peters* is a resident of Madison County. The plaintiffs in all three cases bring their action in behalf of all voters throughout the State who are similarly situated.

Perry O. Hooper, Paul J. Meeks, B. A. Reynolds and Annette Bozeman are the duly elected, qualified and acting probate judges of Lowndes, Montgomery, Jefferson, Dallas and Marion Counties, respectively. They are sued as State constitutional officers and also as representatives of all probate judges in Alabama, who are charged with performing and exercising certain duties and powers with regard to the nomination and election of members of the Alabama Legislature. Defendant J. Richard Bennett, Jr., is the Chairman of the Alabama State Republican Executive Committee, and defendant Robert S. Vance is the Chairman of the Alabama State Democratic Executive Committee. Each is made a defendant in his official capacity as Chairman of the Executive Committee of his political party because, in such capacity, he is charged by law with performing certain duties in connection with the selection, nomination and election of members of the Alabama Legislature. Defendant Carolyn Golden is the Secretary of the Alabama State Republican Executive Committee and defendant H. G. Rains is the Secretary of the Alabama State Democratic Executive Committee. Each is sued as an officer of his political party because, in that position, each is charged by law with certain functions in connection with the selection, nomination and election of the Alabama legislators.

In bringing these actions, plaintiffs contend that the present Alabama Legislature is malapportioned and that, as a result, their voting strength is minimized or diluted, they are underrepresented in the State Legislature and they are denied the right to equal suffrage in contravention of the Fourteenth and Fifteenth Amendments to the United States Constitution and of Sections 198, 199, 200, and 284 of the

Constitution of Alabama (1901).[3] Plaintiffs seek to have

[3] Section 198 provides:

> The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.

Section 199 provides:

> It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them, respectively; provided, that each county shall be entitled to at least one representative.

Section 200 provides:

> It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other.

Section 284 provides in pertinent part:

> . . . Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments.

Although they rely partially on Sections 198-200 as justifying their causes of action, plaintiffs also recognize that certain provisions within those sections conflict with the relief they seek, and, to the extent that they do so conflict, plaintiffs contend that they are invalid. For this contention plaintiffs rely on the principle stated in *Reynolds* v. *Sims,*

Alabama's present apportionment scheme declared unconstitutional and the State statutes and federal court decision upon which it is based declared null and void and of no effect.[4] Plaintiffs urge that this Court adopt their proposed reapportionment plan and, thereby, reapportion the Alabama Legislature on the basis of state-wide single-member legislative districts, impartially selected, without regard to the racial or economic conditions of the district. Plaintiffs further ask that following this Court's adoption of a reapportionment plan, an election to effectuate such plan be held mid-term, that is, before the expiration of the four-year terms to which the members of the present Alabama Legislature were elected.

In response to the complaints filed in this litigation, defendants concur in plaintiffs' assertion that the Alabama Legislature is malapportioned. Nevertheless, they contend that this Court should allow further time for the State Legislature to reapportion itself. Defendants also oppose the single-member district reapportionment plan advanced by plaintiffs, and advocate, as alternatives, multi-district plans which several of said defendants have proposed. In addition, defendants deny that there is any constitutional requirement that, following reapportionment, an election be be held before the expiration of the State legislators' current four-year terms. They contend that to allow the legislators to serve their full terms is equitable, fair and legally permissible.

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377 U.S. 533, 584 (1964), that "when there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."

[4] The current apportionment of the Alabama Senate was provided by Title 32, Sections 2 & 2(1), Code of Alabama (1940) (Supp. 1967), while the current apportionment of the House of Representatives was effected by this Court in *Sims* v. *Baggett*, 247 F.Supp. 96 (M.D. Ala. 1965).

These actions have been brought under Title 42, Sections 1983[5] and 1988,[6] United States Code, to prevent the deprivation under color of state law of rights secured by the Constitution of the United States. Federal jurisdiction is properly grounded in Title 28, Section 1343(3).[7]

A threshold question in these cases is whether the pending cases are proper ones for three-judge court jurisdiction, or whether they are more appropriately one-judge cases. A three-judge court is required for the granting of "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute. . . ." 28 U.S.C.A. § 2281. In the present litigation, plaintiffs clearly have in-

[5] Title 42, Section 1983, United States Code, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

[6] Title 42, Section 1988 provides in pertinent part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; . . . .

[7] Title 28, Section 1343(3) provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . . .

voked constitutional grounds in seeking to enjoin the operation of the Act of the Legislature which provides the current apportionment of the Alabama Senate and which was approved by this Court in *Sims* v. *Baggett,* 247 F.Supp. 96 (M.D. Ala. 1965). Thus, a constitutional issue is presented. Nevertheless, a three-judge court is neither required nor proper when the constitutional question involved is insubstantial. See *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965); *Alabama* v. *United States,* 314 F. Supp. 1319 (S.D. Ala. 1970). The issue of a state statute's constitutionality may be insubstantial because previous decisions upheld the statute or because United States Supreme Court decisions obviously establish its invalidity. See *Kirkland* v. *Wallace,* 403 F.2d 413 (5th Cir. 1968).

Although prior decisions admittedly have rendered the substantiality of the constitutional issues involved here questionable, this Court feels that a three-judge court is still required for the following reasons. First, in *Sims* v. *Baggett,* this three-judge court expressly retained jurisdiction of all the matters now pending, and the latest complaint in the present litigation was filed seeking further relief in that case. In addition, when *Nixon* was filed in 1970, the same three judges were designated to sit on that case. More significantly, the complaint in that suit sought to enjoin the operation not only of a State statute but also of a provision of the Constitution of Alabama. The question involved, therefore, seems substantial.

Should this Court's decision to proceed as three judges prove incorrect, however, the judgment rendered here still will be valid as all three judges concur in the result. See *Browder* v. *Gayle,* 142 F.Supp. 707 (M.D. Ala. 1956).

Jurisdictional matters having been settled, these causes proceeded to a hearing at which the parties presented evi-

dence, both oral and documentary. The cases now are submitted upon the pleadings, the evidence, including several proposed reapportionment plans, and upon the briefs and arguments of the parties.

I.

The history of the present litigation spans more than a decade. In order to understand and appreciate fully the posture of the cases now pending, therefore, it will be helpful to view them in their historical context.

This Court always has recognized that the primary responsibility for reapportionment rests with the Legislature and that no action on the part of this Court, which is not absolutely essential for the protection of plaintiffs' constitutional rights, should be taken before the Legislature of Alabama has had a reasonable opportunity to comply with its duty. *Sims* v. *Frink*, 208 F.Supp. 431 (M.D. Ala. 1962). Indeed, the history of the present litigation reflects a trend of protracted judicial restraint, this Court acting only when confronted with totally inadequate legislative responses to, or complete disregard by the Legislature for, its constitutional mandate. The following is a cursory survey of that history.

Although the Constitution of Alabama required the Legislature to reapportion in accordance with the latest available federal census, prior to the initiation of the present litigation in 1961, *Sims* v. *Frink*, the last time the Legislature had reapportioned was in 1901. Sixty years and six decennial federal enumerations of the population of Alabama had passed without the Legislature having adhered to the command of its own State's Constitution. Nevertheless, in 1962, when plaintiffs in *Sims* sought an interlocutory injunction prohibiting defendants from holding primary

elections in the malapportioned districts, this Court acknowledged the primacy of the Legislature's role in reapportionment and, although it retained jurisdiction, refused to issue the injunction, stating, "[t]here [still] is time [before the general election] for the Legislature of Alabama to comply with its duty . . . ." But having been afforded this additional reasonable opportunity to provide a fair and proper reapportionment, the Alabama Legislature again failed to remedy the "invidious discrimination" ingrained in the apportionment of the State's legislative districts. At that time this Court would have been justified in instituting a complete reapportionment plan of its own. Instead, however, recognizing the delicate relationship between federal courts and state legislatures, this Court effected only the minimum changes considered necessary to release the "stranglehold" on the Legislature and to permit it to reapportion itself in time to conduct the 1966 election of Alabama legislators. In this connection it was observed:

> The Court hopes that the moderate steps taken by this order may be enough to break the stranglehold. They certainly will not suffice as any permanent reapportionment. If they should prove insufficient to break the stranglehold, the Court remains under the solemn duty to relieve the plaintiffs and other citizens like situated from further denial of the equal protection of the laws. That much must be accomplished before there can be a final disposition of this case.

208 F.Supp. at 442.

Again jurisdiction of the case was expressly retained, and after the United States Supreme Court, in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), affirmed this Court's action, it remanded the case for further proceedings, specifically direct-

ing this Court "to take some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim . . . ," that is, in time to be used as the basis for conducting the 1966 election of State legislators. Subsequent to that decision, and because the Legislature again had failed to reapportion itself, this Court, in July of 1965, ordered the parties in *Sims* to file "their proposals for a judicial remedy designed to eliminate the 'invidious discrimination' presently existing in both Houses of the Legislature. Thereafter, the Alabama Legislature convened in special session and enacted bills to reapportion both the Senate and the House of Representatives. This Court accorded each of those acts "the most careful scrutiny and consideration," focusing on the constitutional prerequisite that reapportionment must be substantially on a population basis. *Reynolds* v. *Sims,* 377 U.S. at 568; Alabama Const. art. 5, § 200 (1901). In its decision, filed on October 2, 1965, this Court adopted the multi-member district senatorial scheme of the Legislature, but, because it found the Legislature's House plan discriminatory against Negroes, it provided an alternative plan of multi-member House of Representatives districts. *Sims* v. *Baggett, supra.*[8] This Court retained jurisdiction and ordered that:

> . . . the apportionment of the Alabama Legislature as herein ordered remain in effect without change, except by order of this Court, until the Legislature of the State of Alabama reapportions itself . . . after the next decennial census to be conducted in 1970. . . . [Unpublished decree.]

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[8] Baggett was substituted for Frink as a party defendant by order made and entered August 25, 1965, pursuant to Rule 25(d), F.R.Civ.P.

The next chapter in the development of the present litigation began in January of 1970, when certain "Negro-Americans" residing in the "predominantly Negro ghetto areas" of Montgomery, Mobile and Jefferson Counties filed a class action seeking preliminary and permanent injunctions against the election of State legislators from these three counties on a county-at-large basis. Plaintiffs contended that multi-member districting operated to minimize and cancel out their voting strength to the extent that they were deprived of equal protection of the laws and of the rights guaranteed them by the Fifteenth Amendment to the United States Constitution. Although this Court refused to issue a preliminary injunction because "it would be unreasonable and unwise to require any legislative reapportionment prior to the time fixed in [*Sims* v. *Baggett*], that is prior to the first legislative session following the completion of the 1970 decennial census," this Court did order that jurisdiction be retained, that a hearing on the merits be postponed and that defendants' motions to dismiss be denied. In so ordering, the Court commented upon the merits of plaintiffs' complaint:

> . . . In our opinion, however, the evidence offered in support of the plaintiffs' claims, if such evidence is substantiated by the 1970 decennial census and by the further evidence then available, makes out a strong case for the consideration of the Legislature of Alabama.

Nixon v. *Brewer*, 49 F.R.D. 122, 126 (M.D. Ala. 1970).

Following this order and the ensuing completion of the 1970 census, several events occurred in rapid succession. First, in June of 1971, plaintiff Peters filed a class action in

the Northern District of Alabama, asking that the State Legislature be reapportioned and that mid-term elections be held. On July 12, plaintiffs in *Nixon* and *Sims* filed a motion for consolidation and asked for relief similar to that requested in *Peters*. Ten days later this Court granted the motion to consolidate and issued an order requiring defendants to show cause why the Legislature was not under a mandatory constitutional duty to reapportion and if the Legislature should fail to perform its duty, why this Court would not then be under a duty to reapportion the Legislature constitutionally. On September 20, 1971, *Peters* was consolidated with *Sims* and *Nixon*.

Despite this Court's observation in *Nixon* v. *Brewer*[9] that plaintiffs' complaint made out a strong case, despite the 1970 census' clearly substantiating plaintiffs' claims, and despite the events set out above, the 1971 General Session of the Alabama Legislature adjourned without having met the mandates of both the Alabama and Federal Constitutions concerning reapportionment. On October 8, 1971, this Court set these three cases for hearing to commence December 2, 1971, and expressly notified the Legislature that it had until that date to enact a plan. Although the Legislature has convened since in special session, it has continued to fail to discharge its duty. With the *Nixon* plaintiffs' amendment of November 22, 1971, which added to the prayer for relief a request for state-wide single-member legislative districts, this litigation assumed its present posture. The Court proceeds, therefore, to the merits.

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[9] Wallace was substituted for Brewer as a party defendant by order made and entered July 22, 1971, pursuant to Rule 25(d), F.R.Civ.P. On the same date, Amos was substituted for Baggett in the *Sims* case, as were numerous other parties, in both consolidated cases, who had succeeded to office.

II.

As set out above, plaintiffs ask that we adopt a plan of reapportionment applicable to both houses of the Alabama Legislature. Both plaintiffs and defendants have proffered plans for court-ordered reapportionment, though defendants also argue that this Court should allow further time for the State Legislature to reapportion itself.

The threshold inquiry, then, is whether this Court should now order reapportionment or further defer to the Alabama Legislature. For reasons to be hereinafter specified, we are convinced that further delay is inappropriate. In accordance with that finding and for other reasons set out below, we adopt and order the implementation of the plaintiffs' plan of reapportionment.

Plaintiffs also request that we cut short the terms of the existing legislators, which if left undisturbed expire in December, 1973, and that we order mid-term elections to be held in November, 1972, pursuant to their plan. We deny this prayer for mid-term elections for the reasons discussed in Part III of this opinion.

A. *The Defendants' Plans*

In *Reynolds* v. *Sims, supra,* the Supreme Court first held the principle of one man one vote applicable to state legislatures. On this point, the Court wrote:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable.*

377 U.S. at 577 (emphasis supplied). Since *Reynolds,* the body of case law speaking to questions of apportionment has burgeoned; the applicable principles seem clear.

In *Swann* v. *Adams,* 385 U.S. 440, 443-44 (1967), the Court announced that in a state apportionment scheme where there is any deviation from the norm of one man one vote, it becomes necessary "to articulate acceptable reasons for the variations among the populations of the various legislative districts with respect to both the senate and house of representatives." Furthermore, the burden of demonstrating viable justification for population variance falls upon the state, not upon those seeking reapportionment. *Kilgarlin* v. *Hill,* 386 U.S. 120 (1967); *Swann* v. *Adams, supra; Wold* v. *Anderson,* No. 939 (D. Mont., June 11, 1971).

Perhaps the justification most often advanced by the states for permitting deviation from the ideal of one man one vote is the necessity for maintaining the integrity of political subdivisions such as counties. As a rule the interests of precise equality of representation and of maintenance of county lines are incompatible. Accordingly some variance from perfect equality may be tolerated in order to permit to an extent allowable that political subdivisions remain undisturbed. However, there are severe limitations on the amount of deviation to be allowed. In *Reynolds,* the Court pointed out that:

> . . . careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then

> the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

377 U.S. at 581.

In *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), a congressional redistricting case, the Court held that no amount of deviation, however slight is *per se de minimis.* The *Kirkpatrick* standard is exacting but is founded on sound principles:

> (1) There is "no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimis*"; and
>
> (2) to consider a certain range of variance *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable.

394 U.S. at 531. In the context of state apportionment, perhaps a greater percentage of deviation may be allowed in the interest of preserving representation for political subdivisions than would be allowed in a scheme of federal districting. For the Court in *Reynolds* averred that "[s]omewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting." 377 U.S. at 578. Nonetheless, even with respect to state apportionment no amount of deviation should be considered *per se de minimis.*

To summarize the constitutional requirements declared by the Supreme Court with respect to state apportionment schemes:

> (1) One man's vote must, "as nearly as practicable," be equal in weight to the vote of any other citizen of his state;

(2) no amount of population variance is *per se de minimis*, though in actuality greater deviation may be allowed in the context of state apportionment than in the context of congressional districting; and

(3) any deviation from the ideal of one man one vote must be justified by the state as fostering the effectuation of a legitimate state policy.

Bearing these principles in mind, we now turn to an analysis of the defendants' plans.

On behalf of the defendants, the Attorney General of Alabama has presented three plans of reapportionment to this Court, and on behalf of certain of the defendant-intervenors, Pierre Pelham has proffered one plan. All four plans utilize a multi-member district form of representation, provide for 106 House seats and 35 Senate seats, and hold absolute the sanctity of county lines. As noted above, maintenance of county lines and achievement of mathematical equality in representation are often incompatible. With respect to the four plans submitted by the defendants in these cases, that incompatibility has produced wide variances from the ideal of one man one vote.

In Alabama the number of people ideally entitled to elect one house member is 32,492 where the scheme provides for 106 house seats. If fewer than that number of people are given one representative, they are overrepresented; conversely, if more than 32,492 people are allowed only one representative, they are underrepresented. In a senate plan composed of 35 seats, the ideal population entitled to one senator is 98,406. The same notions of overrepresentation and underrepresentation apply.

The following table serves to indicate the percentages of deviation in each of the defendants' four plans:

Table I

	Range of % of Deviation[10] in House	Total Deviation[11] in House	Range of % of Deviation in Senate	Total Deviation in Senate
Attorney General's Plan No. 1[12]	+18.70% to −29.15%	47.85%	+17.49% to −20.93%	38.42%
Attorney General's Plan No. 2	+15.20% to −14.77%	29.97%	+ 6.37% to −17.91%	24.28%
Attorney General's Plan No. 3	+26.79% to −25.55%	52.34%	+10.77% to −20.93%	31.70%
Pierre Pelham's Plan	+13.45% to −15.20%	28.65%	+14.39% to −11.59%	25.98%

Defendants assert that because the plans tabulated above preserve the integrity of county lines, they satisfy constitutional standards, even though they exhibit wide discrepancies from equality of representation. We cannot accept that contention.

[10] In this column of the Table, a positive number indicates the percentage of deviation for the most overrepresented district while a negative number indicates the percentage of deviation for the most underrepresented district.

[11] Total deviation constitutes the sum of the absolute percentages of deviation for the most overrepresented and the most underrepresented districts.

[12] It should be noted that the Attorney General's Plan No. 1 was actually passed by the Alabama House of Representatives during its last session as H.B. 1980, The McCorquodale Plan.

In *Abate* v. *Mundt*, 403 U.S. 182 (1971), the Supreme Court upheld a plan of apportionment for Rockland County, New York, which evidenced a total deviation of 11.9% (the range of deviations +4.8% to —7.1%) from the standard of one man one vote. In doing so, the Court observed:

> . . . [L]ocal legislative bodies frequently have fewer representatives than do their state and national counterparts and . . . some local legislative districts may have a much smaller population than do congressional and state legislative districts . . . [these facts] lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes, cf. *Reynolds* v. *Sims, supra*, at 578.

403 U.S. at 185. The Court went on to say:

> We emphasize that our decision is based on the long tradition of overlapping function and dual personnel in Rockland County government and on the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas. *And nothing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality.*

403 U.S. at 187 (emphasis supplied).

Several courts have invalidated state apportionment schemes which preserved county lines at the expense of wide population variances among the various legislative districts.[13] These decisions appear to follow the controlling

[13] *Hensly* v. *Wood*, ... F.Supp..... (E.D. Ky., July 26, 1971) (county lines do not justify 25.5% variance in the house or 18.92% deviation in the senate); *Wold* v. *Anderson*, No. 939 (D. Mont., June 11, 1971) (county lines do not justify 23% deviation in the

constitutional principles. In sum, the Court in *Reynolds* announced that equal representation must be the "overriding objective" and cannot be "submerged" in an effort to preserve county lines. Furthermore, in *Abate* the Supreme Court stated that, in the context of local apportionment, preservation of political subdivisions cannot justify a deviation of substantially more than 11.9% and that where state apportionment schemes are at issue less leeway is to be afforded. Owing to both *Reynolds* and *Abate* and to the various other court decisions noted in footnote 13, this Court cannot approve any of the plans submitted by defendants in these cases.

There is an additional reason for refusing to approve any of the defendants' plans. In *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971),[14] a case involving reapportionment of the Mississippi Legislature, the Court stated, "We agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." The defendants ask that we give credence to a plan predicated on an at-large scheme of representation. We cannot accede to that request.

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house or 37.06% variance in the senate); *Scrimminger* v. *Sherwin*, No. C-2257-70 (Sup. Ct. N.J., May 18, 1971) (county lines do not justify 28.83% deviation in the senate); *Howell* v. *Mahan*, ... F.Supp. ..... (E.D. Va., 1971) (county lines do not justify 23.6% variation in the house); *Chavis* v. *Whitcomb*, 305 F.Supp 1364 (S.D. Ind. 1969) (county lines do not justify 24.78% deviation in the house or 28.20% variance in the senate), *rev'd on other grounds*, 403 U.S. 124 (1971). (In reversing, the Supreme Court noted that the district court had been correct in ordering state-wide reapportionment on the basis of the amount of existing population variance but that the lower court had erred in other respects.)

[14] It may be noted that the Supreme Court decisions in *Connor* v. *Johnson* and in *Chavis* v. *Whitcomb*, *supra*, footnote 13, were announced within four days of each other, i.e., on June 3, 1971 and June 7, 1971, respectively.

In *Chavis* v. *Whitcomb*, 305 F. Supp. 1364 (S.D. Ind. 1969), *rev'd on other grounds*, 403 U.S. 124 (1971), the district court implemented its own reapportionment plan utilizing single-member districting. The court's justification for instituting such a plan was its finding that multi-member schemes inherently discriminate on the basis of race. The Supreme Court reversed, holding that multi-member plans do not inherently discriminate. In these cases we choose to follow the general rule enunciated in *Connor*, not on the ground that to utilize multi-member districting would inherently discriminate against blacks, but primarily on the ground that to do otherwise would sacrifice the mathematical precision which can be achieved in Alabama only by a single-member plan. Secondarily, we do note that *Whitcomb* arose in Indiana, a State without the long history of racial discrimination evident in Alabama.[18] Thus we feel justified in pointing out that in Alabama it is reasonable to conclude that multi-member districts tend to discriminate against the black population.

In sum, all four of the defendants' plans are unacceptable since, in conjunction with their discriminatory effect, they fall considerably short of guaranteeing to each citizen of Alabama that his vote "is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579.

B. *The Plaintiffs' Plan*

Plaintiffs' plan is comprised of 105 single-member House districts and of 35 single-member Senate districts. Before evaluating the plaintiff's plan in light of constitutional standards we must consider that it calls for a 105 member House where currently the Alabama House of Representatives

[18] See this Court's discussion and citation of cases evidencing this history in *Sims* v. *Baggett*, *supra*.

consists of 106 seats. The rationale for adopting a plan embodying a 105 member House is clear. Since 35, the number of Senate seats, divides into 105 exactly three times, plaintiffs' plan creates Senate districts simply by combining three contiguous House districts. Therefore, once the 105 House districts are established, with a minimum amount of population variance, it is an easy task to construct the Senate districts. Furthermore, under the present system a resident of County "A" might be grouped with residents of Counties "B" and "C" to create a House district, while he is grouped with residents of Counties "D," "E" and "F" to create a Senate district. Under the plaintiffs' plan an entire House district becomes part of a larger Senate district.

Although the efficacy of reducing the number of seats in the Alabama House to 105 is clear, the question remains whether this Court has the power to effect such a reduction. We hold that this Court has the necessary power. The Alabama Constitution is in nowise inconsistent with provision for a 105 man House. Article 9, Section 198, provides in relevant part:

> The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative.

It is clear beyond cavil that this section establishes only a maximum number of House seats—105 plus one for any county added after 1901—not a minimum. Subsequent to the passage of the Constitution of 1901, Alabama has gained only one county. Accordingly, the number of representatives was set at 106.[16] In the context of the present number

[16] Acts of Alabama, Act No. 7, H. 260, p. 44 (1903).

of counties in Alabama, the State Constitution merely requires that there be at least 67 representatives (one for each county) and not more than 106.

Moreover, case law supports our conclusion. In *Klahr* v. *Goddard*, 250 F.Supp. 537 (D. Ariz. 1966), *aff'd sub. nom.*, *Ely* v. *Klahr*, 403 U.S. 124 (1971), the district court devised a temporary reapportionment plan reducing the number of house members from 80 to 60. The court remarked that "[p]rovision for a House of 60 members is consistent with the [state] constitutional provision for a House 'not to exceed 80 members.'" 250 F.Supp. at 547. The district court further justified its action as a method of achieving the standards of equal representation as nearly as practicable and pointed out that a reduction in house seats in the circumstances there present "provide[d] a desirable simplicity." *Id.* The Supreme Court affirmed and in noway undermined the soundness of the district court's plan which reduced the then current number of representatives. Similarly, in *Herwig* v. *Thirty-Ninth Legislative Assembly*, 246 F.Supp. 454 (D. Mont. 1965), the court devised a plan which provided for 55 senators despite the fact that the number of senators then in office was 56.

Accordingly, we see no difficulty in adopting a plan that reduces the present number of House seats from 106 to 105. Such a plan is particularly valid where the reduction promotes simplicity and is justified by logical reasons.

We now consider whether the plaintiffs' plan meets constitutional standards.

In a scheme of apportionment in which there are 105 House seats, the ideal population per House district is 32,802. With respect to a Senate plan which contemplates 35 Senate seats, the ideal population per district is 98,406. The following table analyzing the plaintiffs' plan illustrates

the percentages of deviation from an ideal population per district.

Table II

	Range of Percentage of Deviation[17]	Total Deviation[18]	Ratio of Most Populated District to Least Populated District
House	+1.08% to —1.15%	2.23%	1.02 to 1
Senate	+0.67% to —0.72%	1.39%	1.01 to 1

In the House portion of the plan, 100 of the 105 legislative districts vary less than 1.00% from perfect mathematical equality of representation. In the remaining five districts the population variance is less than 1.15%. With respect to the Senate portion of the plan, all 35 of the districts exhibit deviations of less than 1.00% from the norm of one man one vote. Any variation which does exist is the product of mathematical necessity. No multi-member plan could achieve such mathematical equality of representation. Accordingly, plaintiffs' plan satisfies the command of *Reynolds* v. *Sims, supra,* that one man's vote, "as nearly as practicable," be equal to another's.

Considering the plaintiffs' plan as a whole, we find that it passes constitutional muster in all respects. There is no

[17] The positive figures represent the percentage by which the least populated district is overrepresented. Conversely, the negative values indicate the percentage by which the most populated district is underrepresented.

[18] Total Deviation constitutes the sum of the absolute percentages of deviation for the most overrepresented and the most underrepresented legislative districts.

federal constitutional requirement that a plan of state reapportionment maintain the integrity of political subdivisions, though a certain amount of deviation from precise equality of representation is allowed in the interests of preserving such integrity. Thus we must determine whether on balance so many county lines are vitiated as to require that the plaintiffs' plan be rejected.

In fashioning their plan, plaintiffs employed seven criteria: (1) that there be single member districts; (2) that the population variance among the individual districts be held to a bare minimum; (3) that county lines be crossed in as few instances as possible; (4) that all areas of each district be contiguous; (5) that each district be as compact as possible (i.e., not overly elongated); (6) that each district be homogeneous (i.e., comprised of all rural or all urban areas); and (7) that the selection of a starting point around which each district was to be constructed be made at random. Plaintiffs eschewed consideration of the racial, economic and ethnic composition (and concentration) of the population in devising their plan. By selecting a starting point at random, plaintiffs have obviated any hint of racial gerrymandering.

As noted above, the plan achieved by plaintiffs exhibits minimal variance from the ideal of one man one vote. It also comports with the general rule discussed above that a court-adopted plan of reapportionment be predicated on single-member districts. Furthermore, it is the use of single-member districts which has enabled plaintiffs' plan to approach so closely precise equality of representation.

The standard expounded in *Reynolds* must here be emphasized: If equality of population among the various voting districts is submerged as the controlling consideration, a plan becomes unacceptable. Plaintiffs' plan crosses county

lines in as few instances as possible; it substantially maintains the integrity of the counties.[19] More importantly, it

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[19] A brief look at some statistics is helpful.

The House portion of the Plaintiffs' Plan:

In Alabama there are 37 counties which have populations of less than 32,802 and which ideally should be placed wholly within one district. Of those 37, 24 are within one district (64.86%), 11 are divided into two districts (29.73%), one is divided among three districts (2.70%), and one is divided among four districts (2.70%).

There are 21 counties which have populations between 32,802 and 65,604 and which ideally should be divided between two districts. Of those 21, 14 are divided between two districts (66.67%), six are divided among three districts (28.57%), and one is divided among four districts (4.76%).

There are three counties which have populations between 65,604 and 98,406 and which ideally should be divided among three districts. Of those three, one is divided among three districts (33.33%) and two are divided among four districts (66.67%).

There are two counties which have populations between 98,406 and 131,208 and which ideally should be divided among four districts. Of those two, one is divided among four districts (50.00%) and one is divided among six districts (50.00%).

There are two counties which have populations between 164,010 and 196,812 and which ideally should be divided among six districts. Of those two, both are divided among six districts (100%).

There is one county which should ideally be divided among ten districts, but it is divided among 12.

There is one county which should be divided among 20 districts, but it is divided among 21.

Overall, then, in 62.85% of the cases a county is divided among the ideal number of House districts, and in 25.74% of the cases a county is divided among one more than the ideal number of districts.

The Senate portion of the Planitiffs' Plan:

In Alabama there are 61 counties which have populations of less than 98,406 and which ideally should be placed wholly within one Senate district. Of those 61, 38 are placed wholly within one district (62.3%), 20 are divided between two districts (32.8%), and three are divided among three districts (4.9%).

There are four counties which should be divided between two districts. Of those four, two are divided between two districts (50%) and two are divided among three districts (50%).

There is one county which should be divided among four districts, and it is so divided.

There is one county which should be divided among seven districts, but it is divided among eight.

achieves near precision in guaranteeing that one man's vote is essentially equal to that of another. We emphasize that to obtain the primary goal of equal representation it is impossible to preserve county lines in all, or even in nearly all, instances. The plaintiffs' plan draws a fair and reasonable balance between the competing interests of affording equal representation and of maintaining county lines. Boundary lines are sacrificed only where absolutely necessary to satisfy the constitutional requirement of one man one vote.[20]

Defendants also criticize the plaintiffs' plan on the ground that its voting districts do not coincide with existing precincts. We do not find this objection persuasive. Since we are refusing to order mid-term elections, Alabama's election officials have adequate time in which to devise a methodology whereby each man's vote may be properly counted. In most instances, people can vote in their old precincts. With respect to those instances in which old precinct lines do not coincide with new legislative district boundaries, several alternatives are available, probably the most attractive of which is to devise new precinct lines which would comport with the new districts. There is nothing unduly burdensome in constructing new precincts.

In a recent Louisiana case, *Bussie* v. *The Governor of Louisiana,* No. 71-202 (E.D. La., Aug. 24, 1971), the court

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Overall, then, in 61.2% of the cases a county is divided among the ideal number of Senate districts, and in 34.3% of the cases a county is divided among one more than the ideal number of districts.

[20] In approving the crossing of county lines, we necessarily fail to give effect to that part of Art. IX, § 200, Alabama Constitution of 1901, which forbids splitting any county between two or more legislative districts. We find that the requirements of equal protection necessitate, in some instances, that county lines give way in drawing legislative districts. To the extent that Section 200 forbids such, it must yield for "when there is an unavoidable conflict between the Federal and a State Constitution the Supremacy Clause of course controls." *Reynolds* v. *Sims,* 377 U.S. at 584.

did order a plan of state reapportionment predicated on precinct lines. However, precincts were used only because "to do otherwise would have meant splitting precincts in the face of impending elections." The next state-wide election of legislators in Alabama will not occur until 1974. Accordingly, we cannot sacrifice the equality of representation accorded in the plaintiffs' plan merely to allow existing voting precincts to be preserved.

The plaintiffs, in composing their plan, used census enumeration districts (hereinafter "ED's") as the primary tool. The smallest geographical areas for which the Census Bureau reports population statistics are the ED and, in a very few highly urbanized areas, the "block." Population figures are not compiled along precinct lines. In order to determine the population of a particular precinct it would be necessary to begin with the population statistics of ED's or blocks and from those figures to project the population of the precinct. The use of that type of guesswork obviously sacrifices accuracy. None of the parties have attempted to devise a plan based upon such projections. We have noted that the principles announced in *Reynolds* cannot be subverted in order to preserve county lines. Certainly we cannot allow such subversion in the interest of maintaining existing precincts.[21]

Aside from avoiding problems of inaccuracy engendered by using precincts as the foundation of a reapportionment plan, another advantage results from employing ED's. In each subsequent census the same ED's will in large measure

[21] Defendants also claim that adoption of the plaintiffs' plan requires that election officials bring their voter lists up to date to ensure that each man's vote is counted in the proper legislative district. It is true that current voter lists are necessary. However, we cannot agree that to require such is unduly burdensome. Alabama election officials are required to have up-to-date lists irrespective of whether new legislative districting is implemented.

be maintained. Accordingly the task of reapportioning in the future will be facilitated.

In sum we find that, unlike the defendants' plans, the plaintiffs' plan satisfies all requirements of the federal Constitution. Any administrative inconveniences precipitated by its implementation can be resolved prior to the 1974 election.[22]

Since this plan will not actually take effect until 1974, additional time could arguably be afforded the Alabama Legislature to permit that body to reapportion itself. We refuse to defer further to the Legislature for three reasons. First, the protracted history of this litigation, as set out in Part I of this opinion, demonstrates that the State has had more than adequate time in which to adopt a plan of reapportionment. The Alabama Constitution itself commands that reapportionment be accomplished in the next regular session following each decennial census. Art. 9 § 199, Alabama Constitution of 1901. Moreover, on March 4, 1970, this Court issued an order in this litigation stating that "[a]fter the completion of the 1970 census the Legislature can be expected with reasonable dispatch to reapportion both the House and the Senate in such a manner as will not deprive any voter of the equal protection of the laws as guaranteed by the Fourteenth Amendment." In our opinion the Legislature has been given every reasonable opportunity

[22] Detailed maps outlining the various House and Senate districts as herein ordered are on file with the Clerk's Office of this Court. Copies of all these maps will be attached to the opinion and decree furnished all defendants with the exception of probate judges. Each probate judge will be furnished a set of maps that will enable him to establish, with certainty, enumeration districts and legislative district lines. In the event any election official encounters difficulty in establishing enumeration district lines or legislative district lines, the Clerk of this Court and the officials of the United States Bureau of Census stand ready to render whatever assistance may be necessary.

to perform its duty. Second, this Court is aware that implementation of the plaintiffs' plan necessitates completion of several time-consuming administrative tasks such as updating present voting lists. In order to afford ample time in which to accomplish those tasks, we feel compelled to adopt a plan now and to order local officials to begin undertaking these duties immediately. Third, and last, by adopting plaintiffs' plan at this point, we allow an adequate period for all parties to exhaust an effective appeal.

Having considered the merits of the various plans and having adopted the plaintiffs' plan as the plan of this Court, we now focus attention to plaintiffs' request that we order mid-term elections to be held in November, 1972.

III.

We have no doubt that this Court has the power to order mid-term elections. *See, e.g., Howard* v. *Adams County Board of Supervisors,* No. 71-2363 (5th Cir., July 29, 1971); *Hall* v. *Issaquena County Board of Supervisors,* No. 71-2312 (5th Cir., July 29, 1971); *Chavis* v. *Whitcomb, supra; Mann* v. *Davis,* 238 F.Supp. 458 (E.D. Va. 1964), *aff'd,* 379 U.S. 694 (1965); *Reynolds* v. *State Election Board,* 233 F.Supp. 323 (W.D. Okla. 1964); *Moss* v. *Burkhart,* 220 F.Supp. 149 (W.D Okla. 1963), *aff'd sub. nom., Williams* v. *Moss,* 378 U.S. 558 (1964). We recognize, however, that the exercise of such power is discretionary.

In light of all the circumstances surrounding these cases, we find that ordering mid-term elections would be inappropriate. As stated earlier, implementation of the plaintiffs' plan requires completion of several weighty administrative tasks. For example, election officials must compile new voter lists for the entire State. Similarly, since the plaintiffs' plan is predicated on population figures for enumeration

districts rather than on population figures for the old precincts, election officials must either find a method of accommodating the old precincts to the new apportionment scheme or draw new precinct lines to comport with the new legislative districts. In order to conduct an election in November, 1972, the above administrative duties, and others, would of necessity have to be accomplished in time for candidates to qualify in March, 1972, and to run in the May primary. In our opinion, to require completion of these tasks in so short a time would place too great a burden on the State's election officials.

Moreover, in *Reynolds* v. *Sims*, 377 U.S. at 583-84, which not only is binding precedent but also is the law of these cases, the Court commented on the question of the required frequency of reapportionment:

> . . . Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reappor-

> tionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.

In *Sims* v. *Baggett, supra,* we ordered a plan of reapportionment which took effect in 1966. Thus, the current Alabama apportionment scheme has been in effect for only about one-half of the ten years adjudged permissible by the Supreme Court in *Reynolds*. Consequently, we feel that ordering mid-term elections to be held in 1972 would unjustly intrude upon "the organization of the State Legislative system." The plan of apportionment which we here adopt will take effect in 1974, only eight years from the inception of the present plan. Notions of comity dictate that courts not interfere with state government unless absolutely necessary. To the extent that the implementation of this plan will interfere, we find, as above demonstrated, that such interference is constitutionally required.

This Court specifically retains jurisdiction of this matter.

A formal order will be entered in accordance with the foregoing.

Done, this the 3rd day of January, 1972.

/s/ Richard T. Rives
United States Circuit Judge

/s/ Daniel H. Thomas
United States District Judge

/s/ Franklin Johnson, Jr.
United States District Judge

In The United States District Court For The Middle District of Alabama, Northern Division

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Civil Action No. 1744-N

M. O. Sims, et al.,

Plaintiffs,

R. E. Farr, et al.,

Intervening Plaintiffs,

United States of America,

Plaintiff and Amicus Curiae,

vs.

Mabel Amos, Secretary of State of the State of Alabama, et al.,

Defendants,

Pierre Pelham, et al.,

Intervening Defendants.

Civil Action No. 3017-N

E. D. Nixon, et al.,

Plaintiffs,

Alabama Independent Democratic Party, a corporation,

Plaintiff-Intervenor,

vs.

George C. Wallace, as Governor of the State of Alabama, et al.,

Defendants,

Pierre Pelham, et al.,

Intervening Defendants.

Civil Action No. 3459-N

J. Elbert Peters, individually, for himself, and for all others similarly situated,

Plaintiff,

vs.

George C. Wallace, as Governor of the State of Alabama, et al.,

Defendants,

Pierre Pelham, et al.,

Intervening Defendants.

ORDER AND DECREE

Filed January 3, 1972

Pursuant to and in accordance with the opinion of the Court filed herein on this date, and for the purpose of effectuating that opinion, it is the Order, Judgment and Decree of this Court:

1. That the present apportionment of the Alabama House of Representatives violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and said apportionment is hereby declared to be unconstitutional and void.

2. That the apportionment of the Alabama State Senate, as reflected by Title 32, Sections 2 & 2(1), Alabama Code (1940) (Supp. 1967), and as approved and adopted by this Court by decree made and entered October 2, 1965, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and said State statute is hereby declared unconstitutional and void.

It is the further Order, Judgment and Decree of this Court that Mabel Amos, Secretary of State of the State of Alabama; J. Richard Bennett, Jr., Chairman of the Alabama State Republican Executive Committee; Carolyn Golden, Secretary of the Alabama State Republican Executive Committee; Robert S. Vance, Chairman of the Alabama State Democratic Executive Committee; H. G. Rains, Secretary of the Alabama State Democratic Executive Committee; William J. Baxley, Attorney General of the State of Alabama; George C. Wallace, Governor of the State of Alabama; E. A. Grouby, Judge of Probate of Autauga County, Alabama; Harry D'Olive, Judge of Probate of Baldwin County, Alabama; George Edward Little, Judge of Probate of Barbour County, Alabama; Fred Davis, Judge of Probate of Bibb County, Alabama; Frank Billenger, Judge of Probate of Blount County, Alabama; Jerry Green, Judge of Probate of Bullock County, Alabama; James T. Beeland, Judge of Probate of Butler County, Alabama; G. Clyde Brittain, Judge of Probate of Calhoun County, Alabama; O. D. Alsobrook, Judge of Probate of Chambers County, Alabama; Paul C. Jordan, Judge of Probate of Cherokee County, Alabama; George D. Smith, Judge of Probate of Chilton County, Alabama; E. Mark Ezell, Judge of Probate of Choctaw County, Alabama; Fred Huggins, Judge of Probate of Clarke County, Alabama; J. B. Toland, Judge of Probate of Clay County, Alabama; William Young, Judge of Probate of Cleburne County, Alabama; James L. Sawyer, Judge of Probate of Coffee County, Alabama; George C. Copeland, Judge of Probate of Colbert County, Alabama; Frank T. Salter, Judge of Probate of Conecuh County, Alabama; Mac Thomas, Judge of Probate of Coosa County, Alabama; Leland G. Enzor, Judge of Probate of Covington County,

Alabama; John M. McSwean, Judge of Probate of Crenshaw County, Alabama; Harold Guy Hunt, Judge of Probate of Cullman County, Alabama; S. Kirke Adams, Judge of Probate of Dale County, Alabama; Bernard A. Reynolds, Judge of Probate of Dallas County, Alabama; Frank Croley, Judge of Probate of DeKalb County, Alabama; Edward W. Enslen, Judge of Probate of Elmore County, Alabama; Mrs. Martha Kirkland, Judge of Probate of Escambia County, Alabama; Wiley J. Hickman, Judge of Probate of Etowah County, Alabama; Sam Collins, Judge of Probate of Fayette County, Alabama; W. W. Weatherford, Judge of Probate of Franklin County, Alabama; J. P. Faulk, Jr., Judge of Probate of Geneva County, Alabama; William Branch, Judge of Probate of Greene County, Alabama; Richard M. Avery, Judge of Probate of Hale County, Alabama; William L. Woodham, Judge of Probate of Henry County, Alabama; R. J. (Bob) Stembridge, Judge of Probate of Houston County, Alabama; Robert I. Gentry, Judge of Probate of Jackson County, Alabama; J. Paul Meeks, Judge of Probate of Jefferson County, Alabama; Berneal Brock, Judge of Probate of Lamar County, Alabama; William B. Duncan, Judge of Probate of Lauderdale County, Alabama; W. J. Lee, Jr., Judge of Probate of Lawrence County, Alabama; Ira H. Weissinger, Judge of Probate of Lee County, Alabama; J. M. Newby, Judge of Probate of Limestone County, Alabama; Harrell Hammonds, Judge of Probate of Lowndes County, Alabama; Preston Hornsby, Judge of Probate of Macon County, Alabama; Miss Myrtle Green, Judge of Probate of Madison County, Alabama; Sammie Daniels, Judge of Probate of Marengo County, Alabama; Mrs. Annette Bozeman, Judge of Probate of Marion County, Alabama; John L. Beard, Judge of Probate of Marshall County, Alabama; John L.

Moore, Judge of Probate of Mobile County, Alabama; Otha Lee Biggs, Judge of Probate of Monroe County, Alabama; Perry O. Hooper, Judge of Probate of Montgomery County, Alabama; William Bryan McAfee, Judge of Probate of Morgan County, Alabama; David S. Lee, Judge of Probate of Perry County, Alabama; Robert Hugh Kirksey, Judge of Probate of Pickens County, Alabama; Ben Reeves, Judge of Probate of Pike County, Alabama; Jimmy McMurry, Judge of Probate of Randolph County, Alabama; Wallace K. Brown, Judge of Probate of Russell County, Alabama; James Satterfield, Judge of Probate of Saint Clair County, Alabama; Conrad M. Fowler, Judge of Probate of Shelby County, Alabama; Wilbur Elisha Dearman, Judge of Probate of Sumter County, Alabama; Kyser Leonard, Judge of Probate of Talladega County, Alabama; Woodrow H. Barnes, Judge of Probate of Tallapoosa County, Alabama; John M. Puryear, Judge of Probate of Tuscaloosa County, Alabama; Mrs. Flora L. Allen, Judge of Probate of Walker County, Alabama; Tom W. Turner, Judge of Probate of Washington County, Alabama; Josiah Robins Bonner, Judge of Probate of Wilcox County, Alabama, and A. L. Wakefield, Judge of Probate of Winston County, Alabama, their agents and successors in office, be and each is hereby enjoined and restrained from furnishing forms for nominations; from receiving nominations, petitions and papers; from certifying nominations, nominees, or elections, and from any other act necessary to the holding of elections, including primary elections, for members of the Alabama House of Representatives for the districts as established under the present apportionment of said House of Representatives. It is the further Order, Judgment and Decree of this Court that each of said individuals as herein named, his agents and successors, be and each is hereby en-

joined and restrained from furnishing forms for nominations; from receiving nominations, petitions and papers; from certifying nominations, nominees, or elections, and from any other act necessary to the holding of elections, including primary elections, for members of the Alabama Senate for the districts as established by Title 32, Sections 2 & 2(1), Alabama Code (1940) (Supp. 1967).

It is the further Order, Judgment and Decree of this Court:

1. That the House of Representatives of the State of Alabama be and the same is hereby divided into districts, and said districts shall be numbered and shall encompass various areas as set forth in Appendix I attached hereto and incorporated as a part of this decree.

2. That the membership of the House of Representatives for the State of Alabama, effective on the day after the general election to be held in November, 1974, be and the same is hereby apportioned on the basis of one representative for each district as set forth in Appendix I to this decree.

It is the further Order, Judgment and Decree of this Court:

1. That the Senate of the State of Alabama be and the same is hereby divided into districts and said districts shall be numbered and each shall encompass three Alabama House of Representative districts as set forth in Appendix II attached hereto and incorporated as a part of this decree.

2. That the membership of the Senate for the State of Alabama, effective on the day after the general election to be held in November, 1974, be and the same is hereby apportioned on the basis of one representative for each district as set forth in Appendix II to this decree.

It is the further Order, Judgment and Decree of this Court:

1. That the apportionment of the Alabama Legislature, both the House of Representatives and the Senate, as herein ordered and directed, shall be effective upon the filing of this decree, with the terms of office of those elected to the legislative seats as herein established, to commnce on the day after the general election to be held in November, 1974.

2. That the legislators heretofore elected to either the House of Representatives or the Senate for the State of Alabama from House districts and/or Senatorial districts that are herein altered, changed or eliminated, may continue to serve as such elected officials until the expiration of the terms of office of said Senators and Representatives on the day after the general election to be held in November, 1974.

It is the further Order, Judgment and Decree of this Court that Mabel Amos, Secretary of State of the State of Alabama; J. Richard Bennett, Jr., Chairman of the Alabama State Republican Executive Committee; Carolyn Golden, Secretary of the Alabama State Republican Executive Committee; Robert S. Vance, Chairman of the Alabama State Democratic Executive Committee; H. G. Rains, Secretary of the Alabama State Democratic Executive Committee; William J. Baxley, Attorney General of the State of Alabama; George C. Wallace, Governor of the State of Alabama, and each of the Probate Judges of the State of Alabama as heretofore named, their agents, employees, and successors in office, be and each is hereby, separately and severally, directed and enjoined to take all necessary and appropriate action to effectuate the apportionment of the Alabama Legislature as set forth in the opinion and decree of this Court, including, but not limited to, updating all voting rolls, alleviating the voting difficulties engendered by

the discrepancy between precinct districts and census enumeration districts, notifying each voter of his proper place to vote, furnishing forms for nominations, receiving nominations, petitions and papers, certifying nominations, nominees, and elections, and performing all other acts necessary for the selection and nomination of candidates—either by primary or by political party action as may be authorized by the laws of the State of Alabama—and for the election in the general election to be held in November, 1974, of the members of the House of Representatives and members of the Senate for the State of Alabama. It is further Ordered that said officials be and each is hereby, separately and severally, enjoined and restrained from taking any action that will hinder or obstruct, or tend to hinder or obstruct the effectuating of this Court's action in apportioning the Legislature of the State of Alabama as herein set out.

It is the further Order, Judgment and Decree of this Court that each Judge of Probate of the State of Alabama as heretofore named, including his successors in office, if any, file with the Attorney General of Alabama, six months from the date of this decree, a report of his progress toward the complete effectuation of the apportionment herein ordered to be implemented and that said Attorney General compile the results of these reports and file with this Court on or before September 1, 1972, his own report and analysis of the progress being made throughout the State toward the complete effectuation of the apportionment herein ordered to be implemented.

It is further Ordered that maps outlining the legislative districts herein created and the enumeration districts herein utilized in the creation of said legislative districts, be furnished each of said defendants to the extent that each defendant may utilize said maps in the identification and establishment of the legislative districts herein ordered.

It is further Ordered that jurisdiction of this cause be and the same is hereby retained for all purposes.

It is further Ordered that the United States Marshal for this district serve personally, or cause to be served personally, a copy of the opinion of this Court filed herein on this date and a copy of this order and decree, including maps and appendices, on each of the following: Mabel Amos, Secretary of State of the State of Alabama; J. Richard Bennett, Jr., Chairman of the Alabama State Republican Executive Committee; Carolyn Golden, Secretary of the Alabama State Republican Executive Committee; Robert S. Vance, Chairman of the Alabama State Democratic Executive Committee; H. G. Rains, Secretary of the Alabama State Democratic Executive Committee; William J. Baxley, Attorney General of the State of Alabama, and George C. Wallace, Governor of the State of Alabama.

It is further Ordered that the United States Marshal for this district serve, or cause to be served, by certified mail, a copy of the opinion of this Court entered herein on this date and a copy of this order and decree, including maps and appendices, on the Probate Judge for each county in the State of Alabama.

The costs incurred in this proceeding are hereby Ordered to be and they are taxed against the defendants, for which execution may issue.

Done, this the 3rd day of January, 1972.

/s/ Richard T. Rives
United States Circuit Judge

/s/ Daniel H. Thomas
United States District Judge

/s/ Franklin Johnson, Jr.
United States District Judge

In The United States District Court For The District Of Arizona

No. Civ-71-89 Tuc Wec

Joanne H. Vinik; Florence I. Daniels; Willie O. Jackson; Frank Miranda, Jr., and Slyvia Miranda; and Common Cause, on behalf of themselves, and on behalf of all others similarly situated,

Plaintiffs,

vs.

Ida Mae Smyth, County Recorder, Pima County, Arizona; The Pima County Board of Supervisors; Gary K. Nelson, Attorney General of Arizona,

Defendants.

OPINION AND ORDER
Filed October 4, 1971

Before Trask, Circuit Judge, and Craig and Copple, District Judges.

Craig, D. J.

In this class action filed July 8, 1971, the plaintiffs sought declaratory and injunctive relief to restrain the defendants from enforcing certain sections of the Arizona Revised Statutes[1] which would cancel all voter registrations exist-

[1] The statute in question which was approved by the Governor on May 18, 1970, and became effective according to its terms from and after November 4, 1970, provided in pertinent part as follows:

ing on the day following the General Election in 1970, and at intervals of 10 years thereafter, and from refusing the right to vote to persons otherwise qualified, but who had not re-registered after the statutory cancellation. The restraint sought was to continue unless and until full compliance had been made with Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973(c)).[2]

The action was instituted pursuant to Section 5 of the Act and other relevant sections,[3] and a three-judge court was empaneled to hear it.

"On the day immediately following the general election in 1970 and at intervals of ten years thereafter, the county recorder shall cancel all voter registrations in his county." ARS § 16-150D., as amended.

[2] § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(c), so far as it is pertinent to this action, provides:

"Whenever a State or political subdivision * * * shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision * * * shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure *may be enforced* without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, * * *." (Emphasis supplied)

[3] 42 U.S.C. § 1973(c) and 42 U.S.C. § 1983; 28 U.S.C. § 1343 and 28 U.S.C. § 2201.

The immediate relief sought by plaintiffs was a temporary restraining order to enjoin the enforcement of the Arizona Statute with respect to a primary election to be held September 21, 1971, by the City of Tucson, Arizona, a municipal corporation, located in Pima County. The temporary restraining order was denied by this court September 14, 1971.

The denial of the application for temporary restraining order was appealed to the United States Supreme Court by way of application to the Supreme Court for a stay order directed to the United States District Court for the District of Arizona denying temporary relief.

On September 20, 1971, Mr. Justice Stewart, for the Court, denied the application of plaintiffs herein, and further ordered that persons in Pima County, Arizona "who would have been eligible to vote, but for the passage of Arizona Revised Statutes 16-150D, Laws of Arizona 1970, C.151, § 12, shall be allowed to vote in the September 21, 1971, primary election, provided that their ballots shall be segregated and impounded subject to a prompt hearing on the merits of the underlying issues and further order by the District Court."

The primary election in the City of Tucson was held September 21, 1971, and pursuant to the order of the Supreme Court of the United States, dated September 20, 1971, the prescribed ballots were segregated and impounded.

The matter came on for hearing before this court September 30, 1971, on the defendants' Motion to Dismiss and the plaintiffs' Motion for Summary Judgment with affidavits filed by both parties.

Prior to the filing of the present action the constitutionality of A.R.S. § 16-150D, as amended, had been attacked in a three-judge District Court, cause No. Civ. 70-352,

Phx., entitled *Leola Johnson, et al.*, v. *Paul N. Marston, County Recorder for Maricopa County, Arizona, et al.* The claim was that the Arizona statute deprived the plaintiffs in that case, and their class, of equal protection of the laws, privileges and immunities and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and on the further ground that the statute violated the due process clause of the Fifth Amendment to the Constitution of the United States.

By opinion and order of this court dated November 27, 1970, this court denied the relief sought by plaintiffs in that action, and upheld the constitutionality of the Arizona statute in question.

On March 22, 1971, in *Johnson* v. *Marston*, 401 U.S. 968, the Supreme Court of the United States affirmed the opinion and order of this court.

Five days after the decision in *Johnson* v. *Marston* became final, and on March 27, 1971, the Director of the Census published in the Federal Register, 36 Fed. Reg. 5809, his determination made pursuant to 42 U.S.C. § 1973 (b)(2) that less than 50 percent of the persons of voting age residing in Pima County and seven other counties, voted in the presidential election of November, 1968.[4]

The parties to this action, as well as the court, agree that the revision of the Arizona Statute under consideration falls within the scope of Section 5 of the Voting Rights Act of 1965, as amended, as to the eight covered counties. *Perkins* v. *Matthews*, 400 U.S. 379 (1971). The action is

[4] The other seven counties which, together with Pima County, thus become the "covered counties" under the Voting Rights Act, are, Pinal, Navajo, Cochise, Coconino, Apache, Mohave, and Santa Cruz. The first election in any of the covered counties following the filing of the determination by the Director of the Census was the primary election in the City of Tucson.

likewise not foreclosed by *Johnson* v. *Marston, supra.* That being so, the principal issue now before the court is whether "the chief legal officer or other official" of the State of Arizona has complied with the provisions of Section 5. *Perkins* v. *Matthews, supra; Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

On that issue the Attorney General of Arizona pursuant to the proviso of Section 5, *supra,* on July 8, 1971, under the authentication of the Secretary of State of the State of Arizona, submitted to the Attorney General of the United States, the text of Chapter 151 of the Laws of 1970 of the State of Arizona containing amendments to Title 16 of the Arizona Revised Statutes, including Section 16-150D, as amended, the validity of which is questioned in this action. The Attorney General of Arizona included in that formal submission, not only the text of Chapter 151, supra, as Exhibit A, but also, as Exhibit B, Title 16 in its entirety with the changes made by Chapter 151 marked thereon, and a certified copy of House Bill 4 which constituted the introduction of Chapter 151, together with House and Senate Amendments thereto and explanatory material concerning legislative history and procedure. The submission was voluminous and detailed. It was received by the Department of Justice on July 12, 1971. If the sixty day period for Justice Department examination began on July 12, it would have expired on September 10, 1971. No evidence was introduced of any objection having been interposed to the legislative change in question, by the Attorney General of the United States at the hearing on September 30, 1971.

On August 2, 1971, the Attorney General of the United States requested further information of the Attorney General of Arizona, which was supplied to the Attorney General

of the United States August 4, 1971, and received by that office August 9, 1971.

In an undated letter written about September 9 or 10, 1971, by the Justice Department to the Attorney General of Arizona, the Justice Department stated that it considered the furnishing of the additional material as effecting an extension of the 60 day period so that it would commence on August 9, 1971. In the meantime, the Department of Justice published proposed guidelines for the administration of Section 5 of the Voting Rights Act of 1965. The parties agreed that the guidelines became effective on September 10, 1971, or subsequent to the date of the submission by the Arizona officials. Those guidelines purport to define what constitutes a "submission" for the purpose of commencing the 60 day period and to give the Attorney General of the United States the authority to extend the time if the "submission" is considered insufficient by the guidelines as interpreted by the Attorney General.

The effect of the guidelines is to make indefinite and uncertain the language and meaning of a statute which is relatively clear. It is also apparent that in this case the statutory change about which complaint is made is definite, clear, concise and simple. It requires all voters to register after the 1970 elections and at ten year intervals thereafter. There are no complex or devious alterations in that section.

It would appear that the Congressional intent behind § 5 of the Voting Rights Act of 1965, as amended, was to provide for the early resolution of questions related to the validity of revisions of election laws of the several states and the political subdivisions thereof. In *Allen* v. *State Board of Elections, supra,* the Court stated (393 U.S. 549),

> "The provision for submission to the Attorney General merely gives the covered state ***a rapid method*** of

rendering a new state election law enforceable." (E
phasis supplied.)

We do not reach the question as to the authority of
Department of Justice to extend the 60 day period by
promulgation of proposed guidelines to the administrati
of Section 5. They were not in force and effect as of
date of this submission. We hold that the Attorney Gene
of Arizona complied with the provisions of § 5 by his su
mission on July 8, 1971; that the 60 day period provid
in § 5 of the Voting Rights Act of 1965, terminated upo
the expiration of 60 days from the receipt of the su
mission by the Attorney General of the United States, i.
September 10, 1971; that the Attorney General of
United States has not interposed an objection within
60 day period following submission, and therefore, th
Arizona Law, Chapter 151 of the Laws of 1970, may
enforced.

The Motion to Dismiss of the defendants is granted;
the Motion for Summary Judgment of plaintiffs is denied.

It Is So Ordered this 4th day of October, 1971.

/s/ Ozell M. Trask
United States Circuit Judge

/s/ Wallett E. Craig
United States District Judge

/s/ Wm. A. Copple
United States District Judge

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Supreme Court of the United States

October Term, 1971

No. 71-364

JOAN S. MAHAN, SECRETARY,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

EDGAR A. PRICHARD, MEMBER,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

CLIVE L. DUVAL, 2D. ET AL.,
Appellees.

EDGAR A. PRICHARD, MEMBER,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

STANFORD E. PARRIS, ET AL.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF ON BEHALF OF APPELLANTS

OPINION OF THE COURT BELOW

The opinion of the three judge United States District Court for the Eastern District of Virginia, in this case, is reported at 330 F.Supp. 1138 (1971) as *Howell* v. *Mahan*, and is also found at page 1 of the "Joint Appendix of the City of Virginia Beach and Virginia State Board of Elections—Joan S. Mahan, et al." (J.A.)[1]

JURISDICTION OF THE COURT

This Court has jurisdiction over the instant case as provided for by 28 U.S.C. § 1253.

The opinion and order of the court below was filed on July 2, 1971. Notice of Appeal was filed on July 13, 1971 (J.A. pp. 49-50) and the Jurisdictional Statement on September 11, 1971. Probable jurisdiction was noted by this Court on April 17, 1972. By letter of May 22, 1972, the time within which to file the instant brief was extended to and includes June 30, 1972.

THE STATUTES INVOLVED

This appeal involves the validity of two state statutes, being the 1971 Virginia Legislative Reapportionment Acts for both Houses of the Virginia General Assembly—the Senate and House of Delegates.

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[1] To avoid duplication of printing, the appendix provided for by Rule 36 incorporates by reference the Joint Appendix of the City of Virginia Beach and Virginia State Board of Elections—Joan S. Mahan, et al., previously prepared as a separate document and submitted with the Jurisdictional Statements of the City of Virginia Beach and the Virginia State Board of Elections—Joan S. Mahan, et al. Such Joint Appendix will be referred to as (J.A.) and the Appendix prepared pursuant to the provisions of Rule 36, as (A).

Chapter 116 of the 1971 Acts of Assembly, p. 198, codified as Section 24.1-12.1 of the Code of Virginia (1950), as amended, 1971 Cumulative Supplement, Vol. 5, p. 74-75, created fifty-two (52) house districts and distributed and apportioned the one hundred members of the House of Delegates throughout such districts for purposes of representation. Chapter 120 of the 1971 Acts of Assembly, p. 219, as amended by Chapter 246, p. 499, codified as Section 24.1-14.1 of the Code of Virginia (1950), as amended, 1971 Cumulative Supplement, Vol. 5, pp. 75-81 amending Chapter 120 not as yet codified, divided the Commonwealth into forty (40) *single* member senatorial districts for each member of Senate.

Due to the length of these statutes they are not set forth herein verbatim but their text is set forth in the Joint Appendix (J.A. pp. 31-43).

The reapportionment statutes were enacted pursuant to the provisions of Art. II, Sec. 6, of the Constitution of Virginia which reads as follows:

> Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

THE QUESTIONS PRESENTED

The reapportionment statutes of the Commonwealth were the genesis of extensive litigation, which culminated in the noting of probable jurisdiction by this Court in the instant case as well as in *City of Virginia Beach* v. *Howell,* No. 71-373, and *Thornton* v. *Prichard,* No. 71-553.

The questions presented in the instant appeal are compatible with those presented by the City of Virginia Beach in No. 71-373 and are as follows:

> Did the court below err in declaring Virginia's Legislative Reapportionment Acts of 1971 violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution insofar as the court (1) ordered in the Legislative Districts for the House of Delegates fragmentation of political jurisdictions despite the fact that the evidence demonstrated that the districts were as close to mathematical exactness as possible, keeping intact political jurisdictions; (2) ordered as to the Legislative Districts in the Senate, the creation of a three-man multimember district despite the fact that the General Assembly as to that body desired complete single-member districts; and (3) enjoined appellants from conducting any elections except in those electoral districts created, established and specified by the court, despite the fact that the Virginia General Assembly made known its intent to enact any new reapportionment legislation required by any Constitutional requirement decreed by the court?

Appellants, in the instant brief, also present argument on the question raised in *Thornton* v. *Prichard,* wherein they are the appellees: whether the court below erred in upholding the multimember House of Delegate districts, originally objected to by the Attorney General of the United States, which objections were subsequently withdrawn.

STATEMENT OF THE CASE

This appeal is taken from an Interlocutory Order of the United States District Court for the Eastern District of Virginia entered in the instant cases on July 2, 1971. The appellants, defendants below, are the Secretary of the Virginia State Board of Elections and the members thereof. The appellees, plaintiffs below, are registered and qualified voters of the Commonwealth of Virginia, as are the plaintiff-intervenors. Defendant-intervenors include the cities of Norfolk and Virginia Beach as well as other registered and qualified voters of the Commonwealth. The cases were consolidated for hearing before the four judges who constituted the three-judge panels.[2]

Three separate suits were filed by plaintiffs in the District Court seeking to enjoin the Virginia State Board of Elections from conducting the upcoming elections for membership in the General Assembly of Virginia in the legisla-

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[2] Civil Action No. 105-71N, *Howell* v. *Mahan,* was filed on March 3, 1971, application for injunction being made to the District Judge of the Norfolk Division of the United States District Court for the Eastern District of Virginia. Civil Action No. 174-71-R, *DuVal* v. *Prichard,* was filed shortly thereafter on March 8, 1971, application for injunction being made to the District Judge of the Richmond Division. Though not consolidated, the same three-judge court was appointed pursuant to 28 U.S.C. § 2284 to hear the matters; the court was composed of a judge of the United States Court of Appeals for the Fourth Circuit and the two District Judges to whom application for injunction was made in each case respectively. Subsequently, Civil Action No. 111-71-A, *Parris* v. *Prichard,* was filed on March 22, 1971, application for injunction being made to the District Judge of the Alexandria Division. A separate three-judge court was appointed to hear this matter, composed of the District Judges to whom application for injunction was made as well as the Circuit Judge and a District Judge previously appointed to the other cases.

By order of the court entered on April 7, 1971, the cases were consolidated "for trial and hearing, before the respective three-judge courts" theretofore designated, and the hearing proceeded before a "four-judge" court.

tive districts created by the General Assembly at its 1971 Extra Session; which session and which action of reapportioning was mandated by the Virginia Constitution of 1971, Article II, Section 6, and the "Schedule" Section 5.[3] The Commonwealth of Virginia has traditionally elected her representatives to the State General Assembly in the odd years; terms for members of the House of Delegates being two years and for the Senate, four years. The entire membership of both Houses of the General Assembly was elected this year in November of 1971,[4] and thus from the newly redistricted seats—those mandated by the court.

Pursuant to the requirements of reapportionment, the General Assembly, by Acts approved March 1, 1971,[5] divided the one hundred member House of Delegates into

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[3] Schedule, Section 5. "The General Assembly shall convene at the Capitol at noon on the first Wednesday in January, nineteen hundred seventy-one. It shall enact such laws as may be deemed proper, including those necessary to implement this revised Constitution. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with Article II, Section 6, of this Constitution. The General Assembly shall be vested with all the powers, charged with all the duties, and subject to all the limitations prescribed by this Constitution except that this session shall continue as long as may be necessary; that the salary and allowances of members shall not be limited by Section 46 of the Constitution of 1902 as amended and that the effective date limitation of Section 53 of the Constitution of 1902 as amended shall not be operative."

[4] "§ 24.1-11. The members of the House of Delegates shall be elected on the Tuesday succeeding the first Monday in November, nineteen hundred seventy-one, and every two years thereafter for a term of two years to begin on the second Wednesday in January succeeding their election."

"§ 24.1-13. Members of the Senate of Virginia to represent each senatorial district of the Commonwealth shall be elected on the Tuesday after the first Monday in November, nineteen hundred seventy-one, and every four years thereafter, for a term of four years, to begin on the second Wednesday in January succeeding their election."

[5] Acts of Assembly, 1971, cc. 116, 120.

fifty-two districts. The redistricting was a traditional combination of single and multimember districts as well as floater districts. See *Davis* v. *Mann,* 377 U.S. 678, 84 S.Ct., 1441, 12 L.Ed.2d 609 (1964). In no case did the plan for the House of Delegates abandon the political jurisdictional lines of the counties and cities and an attempt was made to insure that such lines were maintained and not fragmentized. Although the ten delegates allotted to the County of Fairfax were divided into two five-member multimember districts, Fairfax County, though divided, was not fragmentized, i.e., a *portion* of such jurisdiction being placed with any other political jurisdiction.

The deviations from absolute equality of population arrived at by the redistricting of the House ranged from an under-representation of plus 9.6% to an over-representation of minus 6.8%, or a total variance of 16.4%. As noted by the Court, however, the 42nd District, a floater shared by the cities of Chesapeake, Portsmouth and Virginia Beach would have as to that one instance increased the total variance to 23.6%.

In the forty member State Senate, the General Assembly created forty single-member districts. The application of this single-member district policy for the upper house did create some fragmentizing of political jurisdictions in twelve instances out of the one hundred thirty-eight political jurisdictions (counties and cities) in the Commonwealth.

The division of the City of Norfolk into three single-member Senatorial Districts, one of which included a portion of the City of Norfolk and a contiguous portion of the City of Virginia Beach, were the districts under attack in the senatorial suit. The three districts, known as the Fifth, Sixth and Seventh Senatorial Districts, had populations of 116,084, 116,103, and 115,959, respectively. Since each,

ideally, should have 116,212, the percent deviations from the norm for the three districts were minus 0.1%, minus 0.02%, and minus 0.2%, respectively.

The redistricting of the Senate was done entirely on the basis of the numbers provided by the 1970 Decennial Census. The population of the Norfolk Naval Base, as enumerated by the Bureau of Census, consisted of 36,693 individuals stationed aboard ships. The Census tract containing such enumerated personnel was allocated to the Fifth Senatorial District, where the U.S. Naval Station was geographically situated. The evidence introduced showed that approximately 21,000 of these individuals enumerated in the Fifth District did not, in fact, "reside" there in the legal context of the word, and further that some 9,000 of those 21,000 did not even reside in the Sixth or Seventh Districts as well. It was contended that the only manner of correcting this alleged inequity would be to combine the Fifth, Sixth and Seventh Districts into a three-member multi-member Senatorial District so that these Naval personnel home-ported at Norfolk could be spread over a wider area.

The cases were originally set for consolidated trial in the District Court on May 24, 1971. On May 7, 1971, however, the Attorney General of the United States, acting pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), interposed objections to Virginia's reapportionment plans as related to both the House of Delegates and the Senate. Objections to the House plan were based on *Chavis* v. *Whitcomb,* 305 F.Supp. 1364 (S.D. Ind. 1969), then pending decision in this Court and were directed to five multimember districts in certain metropolitan areas. Objection to the Senate plan was confined to the route of the dividing line between the Fifth and Sixth Senatorial Districts in the City of Norfolk. As a result of these objec-

tions, the District Court, on May 24th, directed that the instant cases be continued until June 15, 1971, and further directed the General Assembly, which had remained in session since January of 1971, to act to remove the objections of the Attorney General, stating:

> (c) That unless on or before June 15, 1971, Virginia has adopted and submitted reapportionment legislation either to the Attorney General of the United States or to the District Court for the District of Columbia for declaratory judgment as provided for in Section 5 of the Voting Rights Act, this Court shall proceed with the trial of these suits and thereafter formulate a plan of reapportionment within the prescription of the Voting Rights Act and resolving the valid objections, if any, of the plaintiffs to the 1971 reapportionment legislation; . . . . (See J.A. pp. 43-46.)

Following this action, this Court on June 7, 1971, handed down its decision in the case of *Whitcomb* v. *Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), thus precipitating removal by the Attorney General of the objections to the House plan. (J.A. p. 53). The General Assembly then enacted an amendment to the Senate Plan for redrawing the line between the Fifth and Sixth Senatorial Districts to remove the remaining objection of the Attorney General,[6] and the instant cases proceeded to trial on June 16, 1971. Black plaintiff intervenors, who had by then appeared in the case (their intervention was granted on May 18, 1971) urged the court to hold that the Attorney General of the United States erred in withdrawing his objection, or in the alternative that the court declare the multimember House districts in five major cities of Virginia invalid on the ground that

[6] Acts of Assembly, 1971, c. 246. (See also J.A. p. 51, letter of David L. Norman, Acting Assistant Attorney General, Civil Rights Division, dated August 13, 1971, approving Chapter 246 [S.B. 125]).

they are inherently discriminatory, depriving "Negro citizens of a chance to elect one (or more) of their race to the General Assembly." *Mann* v. *Davis,* 245 F.Supp. 241 (E.D. Va.), aff'd sub. nom., 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed.2d 35 (1965). The latter position was asserted on the ground that due to the applicability to Virginia of the Voting Rights Act, the burden was on the Commonwealth (despite no objection of the Attorney General) to demonstrate that the redistricting would not have the purpose or effect of diluting black voting strength. The District Court denied both requests. As to the contention of the other plaintiffs however, the court in its Interlocutory Order declared and adjudged Chapters 116 and 120 (as amended by Chapter 246) of the Acts of Assembly of 1971, generally known as the reapportionment statutes, to be invalid as violative of the Equal Protection Clause of the Constitution of the United States. The District Court went on to devise its own reapportionment plan for the Virginia House of Delegates, as found in its opinion, and the Court further directed that Senatorial Districts Five, Six, and Seven, comprised of the City of Norfolk and a portion of the City of Virginia Beach, be consolidated into a single district from which three state senators are to be elected at large. The court also rearranged the multimember House district in the City of Norfolk, upholding it, but expanding it to include a portion of the City of Virginia Beach (not the same portion of the City of Virginia Beach which the court ordered joined to the City of Norfolk for the creation of the multimember Senatorial district). It was directed that all elections in Virginia, including those scheduled for November 2, 1971, be held pursuant to the court's plan, the Order stating:

> 2. That members of the Senate and of the House of Delegates of the General Assembly of Virginia be

elected from the electoral districts described in said opinion, anything in the existing statutes of the Commonwealth of Virginia to the contrary notwithstanding;

3. That such of the defendants herein, and their successors in office, as are charged by law with the conduct of said elections, as well as the agents, employees and attorneys thereof, be, and each of them is hereby, enjoined and restrained from conducting any of said elections in any electoral districts except those established and specified in said opinion as aforesaid; . . . .

SUMMARY OF ARGUMENT

I.

The Court, In Its Blind Adherence To Numbers Only, Erred In Fragmenting Political Jurisdictions In The House Legislative Districts.

This Court has consistently upheld the right of a state to choose the form of representational government best suited to the needs of its people. A balancing of both houses of a bicameral legislature has been sanctioned as has adherence to political jurisdictional lines. Because of this, and rightfully so, no set numerical variance has ever been established. Each plan must be individually devised by looking at the entire state to be reapportioned. All that has ever been required is a conscientious and good faith effort to achieve equality. This the General Assembly of Virginia was found to have done. To apply the mathematical exactness standards of Article I, Section 2, as laid down in various congressional redistricting cases, is to repudiate all past decisions relating to flexibility that a state must have to govern herself and to ignore well established concepts of federalism. The application of strict mathematical exactness alone ig-

nores all past constitutional premises and becomes only a game of numbers.

II.

The Imprecise Creation Of A Multi-Member Senatorial Seat Was Without Any Constitutional Basis And Further Disrupted Valid Legislative Policy.

The Virginia General Assembly, in drafting the reapportionment legislation here at issue, was presented with the initial problematic decision of what empirical data was constitutionally acceptable to provide the basis for a redistricting plan, and which at the same time best indicated the true number of individuals requiring representation in the Virginia legislature. In selecting the broadest possible base (a census of total population), the General Assembly's decision that all people residing in the Commonwealth, citizen or not, voter or not, would be encompassed in the redistricting effort and would receive proportional reprensentation in the legislature, was constitutionally permissible.

Reduced to its essentials, the issue before this Court concerns the validity of the Virginia General Assembly's reliance on the method and manner utilized by the United States Bureau of the Census in enumerating the population of the Fifth Senatorial District, and its refusal to rely on the product of a sample survey conducted on the basis of zip codes alone. The latter was accorded by the District Court greater weight than the enumeration of the United States Bureau of the Census, on the basis of an assertion that registered voters in each senatorial district did not approximate the population of such district. Such an allegation, however, raises no constitutional deficiency.

III.

The Requirement Of The District Court That Elections Be Conducted Only From Districts Mandated By Court Order Runs Afoul Of Every Decision Of This Court Which Recognizes The Doctrine Of Federalism And Separation Of Powers.

The action of the District Court in drafting a redistricting plan of its own and mandating that all elections for the Virginia General Assembly be held from the districts as redraw constituted a flagrant example of judicial legislation. By failing to honor the well defined dichotomy between judicial determination of the constitutional limitations which govern reapportionment efforts and the inapporpriateness of peremptory judicial relief in such instances the court, without justification in fact or in law, usurped the prerogative of the Virginia General Assembly.

IV.

The Voting Rights Act Allegations Raised In The Thornton Appeal, Coupled With Allegations Of Fourteenth Amendment Denial, Are Without Merit.

Despite this Court's decision in *Whitcomb* v. *Chavis, supra,* combined with the fact of the Commonwealth's compliance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), the black plaintiff intervenors have pursued their challenge to the multi-member districts encompassing the City of Richmond and similar districts throughout the Virginia Commonwealth. In so doing, the intervenors assume the anomalous position of conceding that they are unable to prove that the multi-member districts operate as instruments of racial or economic discrimination. Rather, they make the wholly untenable assertions that, first, the Attorney General of the United States erred in withdrawing his objection to the redistricting plan after the

announcement of the *Chavis* decision, *supra,* and, further, that because there has been racial discrimination in the past the courts should put the Commonwealth to the burden of proving itself free from discrimination in reapportionment.

The practice and concept of multi-member districting were given express approval by this court in *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and *Fortson* v. *Dorsey,* 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed. 2d 401 (1965). Moreover, Virginia has maintained a tradition of honoring the integrity of city and county lines in effectuating reapportionment, a tradition approved by this Court in *Davis* v. *Mann, supra.* No discrimination being shown by black appellants, the Commonwealth of Virginia, having complied with all provisions of the Voting Rights Act, is now entitled to implement its legislative enactment, and stand on a par with all other states.

Should this Court find merit, however, in black appellants' assertion that the Attorney General erred in withdrawing his objection, the Court should nevertheless reject arguments predicated on such error as the Attorney General failed to interpose a timely objection to the reapportionment plan.

ARGUMENT

I.

The Court, In Its Blind Adherence To Numbers Only, Erred In Fragmenting Political Jurisdictions In The House Legislative Districts.

The General Assembly of Virginia, "in the exercise of its wisdom and in the light of its awareness of the needs and desires of its people", *Minnesota State Senate* v. *Beens,* ..... U.S. ....., CCH S.Ct. Bull. (Current Term at B1987), Nos. 71-1024, 71-1145 (Apr. 29, 1972), decided to join

twenty-five sister states[7] and create for an existing bicameral legislature an upper body having exclusively single member districts to balance a lower house which, while maintaining population equality, would observe the traditional guarantee of an independent voice to political jurisdictions, using a combination of single-member, multi-member and floater districts.

In bringing such plan into reality a forty single-member-district Senate plan was drawn, subsequently attacked on grounds other than population disparities, see Argument II, *infra,* and a fifty-two district House plan for the 100 member House was devised, now before the Court on the question of population disparities.

A plethora of controversy has arisen since this Court first entered the "political thicket," but at least three main principles have remained constant. First, when determining the validity of a redistricting plan, consideration must be given to the legislature as a whole rather than an isolated look at each body independently. *Burns* v. *Richardson,* 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Reynolds* v. *Sims, supra.* Second, the fact that a particular degree of deviation has been upheld or, it logically follows, has been declared impermissible has little bearing on the validity of similar variations in other states. In other words, an abstract number cannot be exalted into a constitutional command. *Reynolds* v. *Sims, supra; Swann* v. *Adams,* 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967). Third, the maintenance of political boundaries while maintaining population

[7] California, Colorado, Connecticut, Delaware, Idaho, Illinois, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah and Wisconsin, are other States which have exclusive single-member districts in their State Senate. See, Book of the States, Apportionment of Legislatures, p. 82.

equality is a valid justification for percentage deviations. Such policy is a constitutionally permissible alternative open to a legislature. *Reynolds* v. *Sims, supra; Minnesota State Senate* v. *Beens, supra; Grivetti* v. *Illinois State Electoral Board,* 335 F.Supp. 779 (N.D. Ill. 1971), *aff'd,* ..... U.S. ....., CCH S.Ct. Bull. (Current Term at B2003), No. 71-1156 (May 25, 1972). Inescapably, if the above principles are to be maintained, the congressional standards of mathematical exactness as set forth in *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed. 2d 519 (1969) and *Wells* v. *Rockefeller,* 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 530 (1969), are not necessarily applicable to state legislative redistricting. *Connor* v. *Williams,* ..... U.S. ....., 92 S.Ct. 656, ... L.Ed.2d ..... (1972); *Jackman* v. *Bodine,* 55 N.J. 371, 262 A.2d 389, *cert. denied,* 400 U.S. 849, 91 S.Ct. 39, 27 L.Ed.2d 87 (1970). It is the position of these appellants that because of the variables existent between congressional redistricting and legislative redistricting "[s]omewhat more flexibility . . . [is] *constitutionally permissible* with respect to . . ." the latter. *Reynolds, supra* at 578. (Emphasis supplied.)

As will become apparent, the lower court, in its zeal to legislatively play with census figures, ignored all of the above.

(A)

Comparison of Both Houses

Footnote 13 of *Burns* v. *Richardson, supra,* emphasizes what the lower court ignored: that a total scheme of apportionment best suited to a state's needs is what must be construed, and that total scheme must be what is reviewed. The lower court overlooked this Court's requirement of legislators that:

In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State." See also *Holt* v. *Richardson,* 240 F.Supp. 724, 729 (Hawaii 1965).

While this Court has emphasized not only in *Burns* v. *Richardson, supra,* but also in *Maryland Committee For Fair Representation* v. *Tawes,* 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595 (1964), that a court in reviewing an apportionment plan must consider the scheme as a whole, and cannot sever one House from the other, the reason for viewing the scheme as a whole was succinctly set forth in *Reynolds* v. *Sims, supra,* the Court stating:

We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same—population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will

> be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of a single-member district while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis. 377 U.S. at 576.

Yet the District Court ignored completely the balance concept the General Assembly initiated: [t]he balancing of single member districts in one body countering political jurisdictions adhering to population equality in the other. Such was abolished by the District Court's order. For example, the lower court fragmentized Wythe County in the Fourth House District—deviating plus 6.0%—and placed a portion of the county with the Sixth House district—deviating minus 1.5%—without ever looking at the Senate Districts containing the Fourth and Sixth House Districts, which Senate Districts, the Thirty-seventh and Thirty-eighth with deviations of minus 2.5% and plus 0.9%, respectively, balanced off the deviations in the House plan. This should not have been ignored.

Likewise the lower court, looking only at the House plan, fragmentized five thousand eight hundred sixty-three (5,863) citizens of Rockingham County in the Sixteenth House District—deviating plus 9.6%—and, ignoring a nat-

ural impassable boundary, namely, the Blue Ridge Mountains, placed such portion of the county on the other side of the mountain in the Twenty-sixth House District consisting of Albemarle, Greene, Fluvanna Counties and the City of Charlottesville—deviating minus 3.7%—while at the same time fragmenting a portion of Albemarle County consisting of two thousand ninety-two (2092) citizens into yet a third legislative district.

It is submitted that before the District Court, looking only at the House plan, fragmented the County of Rockingham, it should have considered the Senate District comprising Rockingham (the Twenty-sixth) which deviated minus 4.37%.[8]

The populations and percentage deviations for both the House and Senate legislative districts are set forth for the Court's convenience in the Joint Appendix, p. 56 *et. seq.*

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[8] Numerous other examples can be cited, one of which is the court's own redrawing of both the Senate and House seats for the Cities of Norfolk and Virginia Beach. Under the General Assembly's plan, the Senate seats (all single members) for the cities were: one seat for a portion of Virginia Beach, two seats for a portion of Norfolk, and a fourth seat for a portion of Virginia Beach (forty thousand, one hundred ninety-five [40,195] citizens) together with a portion of Norfolk (seventy-five thousand seven hundred sixty-four [75,764] citizens). House seats maintained political boundaries, with a floater being utilized in Virginia Beach. The Court consolidated the two Senate seats in Norfolk with the seat consisting of a portion of Virginia Beach and Norfolk, requiring forty-thousand, one hundred ninety-five (40,195) citizens of Virginia Beach to vote with the total population of Norfolk of three hundred seven thousand, nine hundred fifty-one (307,951). At the same time, the Court fragmented Virginia Beach in the House and instead of balancing the two bodies together by combining in the House a portion of Norfolk with Virginia Beach, it made portions of Virginia Beach vote with the total population of Norfolk in both houses of the General Assembly. The Commonwealth points out this aspect of the court's plan, not in the specific interest of either City, but as an example that with the political considerations inherent in such moves the General Assembly and not the court should have been the author of such a decision.

(B)

ABSTRACT NUMBERS

A judicious review of such percentage variations produces more than a mere arithmetical calculation of an underrepresentation of plus 9.6% in the 16th District and an overrepresentation of minus 6.5% in the 12th District or a total variance of 16.4%. Not one decision of this Court enunciates a constitutional principle that an abstract numerical variance can be transposed into a requirement of invalidation *per se.*

As recognized since *Reynolds* v. *Sims,* the development of permissible mathematical deviations must be developed "on a case by case basis," 377 U.S. at 578. The extent to which equality may practically be achieved may differ from state to state and from district to district. *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). In *Swann* v. *Adams, supra,* this Court emphasized that simply because a certain percentage variation is upheld in one case, this does not mean that it is authority for all cases to follow:

> . . . the fact that a [certain percentage] variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case.' 385 U.S. at 445.

A Court may not therefore either uphold or throw out as unconstitutional mathematical deviations existing in a legislative redistricting plan simply because other cases have, in considering various mathematical variations, found them constitutional, or even found variations of smaller magnitude to be unconstitutional. The goal to be reached by a legislature is not some preconceived artificial percentage

variation. The goal, and the standard which the courts must decide whether the legislature met, is a good faith effort to achieve precise mathematical equality with only the limited population variances which are unavoidable despite this good faith effort or for which justification is shown. *Reynolds* v. *Sims, supra.*

Yet even though each and every decision of this Court requires a determination on a case by case basis whether a good faith effort was made to achieve mathematical equality, the Court below ignored the facts in the House plan and struck down the deviations found therein merely because "[p]lans including a variation of approximately that amount have not survived Supreme Court scrutiny [citations omitted]" thus "the statewide range of deviation [calculated with or without the Chesapeake floater] will not pass constitutional muster." *Howell* v. *Mahan,* J.A. p. 3, fn. 1.

This blind adherence to the tyranny of numbers alone was in the face of the only evidence in the case which showed clearly that the deviations in the House plan were "the minimum [possible] above and below the norm, keeping intact political boundaries. . . ." (Defendants' Exhibit No. 8.)

The plaintiffs in the House suits put on no evidence showing that small deviations in the plan were possible, cf. *Kirkpatrick* v. *Preisler, supra; Swann* v. *Adams, supra.* In fact, they stipulated to Defendants' Exhibit No. 8 and advocated merely a single member districting plan ignoring political boundaries. The Commonwealth would naturally concede that if political boundaries are ignored there is no reason why a percentage of exactness cannot be achieved. As this Court points out, however, "mathematical exactness or precision is hardly a workable constitutional requirement." *Reynolds* v. *Sims, supra* at 577. Conversely, the mathemati-

cal application of maximum deviations in an ad hoc manner is hardly a valid constitutional requirement.

The lower court failed to consider not only the Senate plan, as previously indicated, but it ignored such other factors in the House plan as: the overall average percentage variance being only ±3.89%; the minimum population necessary to elect fifty-one representatives (a majority of the House) being 2,291,543, or 49.29% including the floater districts; the ratio between the smallest (12th District) and largest (16th District) being 1.18 to 1; the fact that of all the House districts, thirty-five (35) were within 4% of perfection and only two exceeded 8%, (seventeen exceeded 4%, nine exceeded 6%) (See App. ....); and, most importantly, its own finding that the deviations existent came as close to mathematical perfection as possible while maintaining political subdivision lines (J.A. p. 5).

Finally, and this must be stressed, the court made its own "legislative" finding as to *its* plan, that it was "a good faith effort to achieve absolute equality," but nowhere was there, nor could there be, the required "judicial" finding that a good faith effort to achieve equality was not made by the Virginia General Assembly. The "conscientious and good faith effort" to achieve equality as nearly as possible is what the District Court grounded the validity of deviations of ±8.79% and —10.62% upon in *Summers* v. *Cenarrusa,* 40 U.S.L.W. 3493 (U.S. Apr. 11, 1972). Nowhere was it found by the Virginia court that the Virginia apportionment structure contained a built in bias which tended to favor particular geographic areas or political interests, or which necessarily tended to favor less populous districts over their more highly populated neighbors, or which catered to political strengths. *Abate* v. *Mundt,* 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971); *Ely* v. *Klahr,* 403 U.S. 108, 91

S.Ct. 1803, 29 L.Ed.2d 352 (1971). Only the numbers captured the court's attention.

The only instance in which the court removed its eye from the abacus was in an erroneous application of *Kirkpatrick* v. *Preisler, supra,* when it moved a delegate from the Tidewater region of Virginia to the Northern Virginia area due to estimated population growth trends. Again acting in a legislative role, the court, citing *Kirkpatrick,* stated that anticipated enlargement is an element that "may be appraised in determining the measure of legislative representation." (J.A. p. 18). The evidence with respect to population trends, however, was conflicting and indicative of the many variables which could daily change population trend projections, including in northern Virginia a decentralizing of the Federal Government (See Griffis Deposition).

The evidence further indicated that as to Tidewater, the City of Virginia Beach has been, and is expected to be, the second fastest growing area in the Commonwealth on a percentage basis. (Griffis Deposition, p. 30). Also "Intervenor's (City of Norfolk) Exhibit #1, in Deposition of Robert Griffis" suggested that Norfolk's population density could drastically increase due to a new building program, thus changing population trend projections. Such findings are simply not relevant, for this Court in *Kirkpatrick* clearly stated, not that courts should consider population trends, but that states "*may* properly consider them." The General Assembly of Virginia chose not to consider such trends. This was a legislative determination the court should have accepted. If such trends were to be utilized, their utilization surely should have been applied "throughout the State in a systematic, not an ad hoc, manner." *Kirkpatrick* v. *Preisler, supra,* at 535. The application of population trends in a single instance can hardly be deemed a systematic application.

In no case, has this Court invalidated a state reapportionment plan containing the representative policies reflected in the Virginia plan.

(C)

MAINTENANCE OF POLITICAL SUBDIVISIONS

The lower court in its redistricting failed to adhere to the legislative policy in the House of maintaining the integrity of political jurisdictional lines. It simply declared that there was no known necessity for adhering to such lines, and thus proceeded to fragment[9] various Virginia counties and cities. It is submitted, however, that tolerance of political jurisdictional lines is justification for some deviation. How much deviation is tolerable has been determined by this Court to be that which is shown unavoidable. The variations in the House plan were shown, by uncontested evidence, unavoidable in the case at bar and the lower Court recognized that dissolving the deviations in the House plan ". . . is not achievable at all if the integrity of political subdivisions is mandated." J.A. p. 5.

The policy of the Virginia General Assembly as to the House plan was to keep intact political boundaries. There was no showing that additional or unnecessary population variances among the legislative districts resulted, and there were, therefore, no variances which the State was mandated to justify. *Kirkpatrick* v. *Preisler, supra,* at 531.

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[9] "Fragment" as used herein is intended to mean the placing of a "portion" of a county or city with another political jurisdiction. Such fragmentation is vastly different from the "dividing" of Fairfax County, Virginia, into two five member, multimember districts. Such division still maintained the County as a whole (no portion was excised) and avoided the criticism contained in *Connor* v. *Johnson,* 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed. 2d 268 (1971). See Eisenberg and David, 1 Member Versus 2, 3, 4 or 5, 55 *National Civil Review,* pp. 78-79 (Feb. 1966) (value of single versus multimember legislative districts assessed, with neither found perfect).

Nor did plaintiffs attempt to show that reliance on political jurisdictional lines was unjustified. Other than an attack on multimember district *per se,* which attack was rejected by the District Court, the attack on the percentage deviations was solely on the ground that lesser variations had been struckdown as unconstitutional.[10] This, as seen, was not a proper method of advocating their alleged unconstitutionality and the Court erred in acceding to this line or argument.

As a matter of law the Commonwealth need not abandon its policy of adherence to political lines, since this Court has recognized such adherence as justifying departure from absolute equality and such recognition is founded as well in previous Virginia cases decided in this Court.

In *Davis* v. *Mann, supra* at 686-87, the Court recognized that Virginia has a tradition of respecting the integrity of the boundaries of cities and counties in drawing lines and thus districts have always been constructed only of combinations of counties and cities and not to be pieces of them, resulting in floterial and multimember districts, both of which have been sustained. As stated in *Reynolds* v. *Sims, supra:*

> A consideration that appears to be of more substance in justifying some deviations from populations-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according to political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are fre-

[10] Only in Congressional cases has this court struck down lesser variances. These cases are inapplicable. See Argument, *infra.*

> quently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering." 12 L.Ed.2d at 538. (Emphasis added.)

Swann v. *Adams, supra,* again reaffirmed:

> . . . that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the mainteance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines. 385 U.S. 444.

Recently this Court again reiterated that ". . . a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." *Abate* v. *Mundt, supra.* True, the *Abate* decision was based on the peculiar facts existent in Rockland County, New York, and its towns, the local structure of government under scrutiny. However, this Court has long recognized Virginia's tradition of adhering to political jurisdictional lines and affirmed such tradition in *Davis* v. *Mann, supra,* on the same date that it authorized the according of independent representation to political subdivisions, in at least one body of the legislature. *Reynolds* v. *Sims, supra.* Such tradition can be traced back at least to the requirements of the Virginia Constitution of 1850, Article IV, Section 2, which specified apportionment by county and city and also provided for floterial representation as well as rotation in alternating sessions of representatives in the

House of Delegates between two counties with population beyond the representative ratio.[11]

As this Court emphasized in *Reynolds* v. *Sims, supra,* local governments carry out much of the various responsibilities of State government as well as having direct concern in the enactment of numerous local legislative enactments. This alone justifies Virginia's tradition of adherence to political jurisdictions. Moreover, the revised Virginia Constitution now allows for the first time special or local legislation for counties as well as for citiees. Revised Constitution of Virginia, Article VII, Section 2. Those provisions now permit counties the constitutional flexibility formerly afforded only to cities in providing services for their citizens. Of approximately 133 pieces of special legislation introduced in the 1972 General Assembly, approximately 104 originated in the House, the body designed to give an independent voice to the Commonwealth's cities and counties.

Under the Court's plan, a situation could arise where the 1602 citizens of Wythe County, Virginia, who were placed in the Sixth Legislative District are opposed to local legislation pending in the General Assembly for their county. They must voice such opposition to the delegates representing 91,620 other persons in the Sixth Legislative District composed of the Counties of Carroll, Floyd and Montgomery and the City of Radford, rather than oppose only their 20,537 fellow citizens of Wythe County.

The Commonwealth is not asserting that population equality must take a back seat to the policy of maintaining political subdivision lines. Such goal certainly cannot justify extreme population variances. The basic standards of equality of population among legislative districts must be main-

[11] See McKay, Reapportionment: The Law and Politics of Equal Representation, pp. 438-443, for a summary of Virginia reapportionment.

tained. It is submitted, however, that the legislature's plan with its 16.4% overall variance, while according independent voice to political jurisdictions in the House of Delegates, is substantially preferable to the District Court's plan with an overall variance of 10.3%[12] which, in its fragmentation effect in eleven instances throughout the Commonwealth, has decreed "one man-no vote" for many citizens. In most instances these fragmentized segments contain less than three thousand (3,000) persons and as few as one thousand six hundred two (1602) in the case of Wythe County.

Why the adherence to "the traditional integrity in Virginia of city and county lines," *Mann* v. *Davis, supra,* was sanctioned by the district court then and seven years later the same judges saw no need for political jurisdictional lines is inexplicable. As this Court recognized, not only in *Reynolds* v. *Sims, supra,* and *Abate* v. *Mundt, supra,* but most recently in *Minnesota State Senate* v. *Beens, supra,* judicial reapportionment may be justified by the observance of geographical boundaries. *Klahr* v. *Goddard,* 250 F.Supp. 537 (D. Ariz. 1966); *Herweg* v. *Thirty-Ninth Legislative Assembly,* 246 F.Supp. 454 (D. Mont. 1965). See also *Stevenson* v. *West,* ..... F.Supp. ....., C.A. No. 72-45 (D. S.C. April 7, 1972). State legislative apportionment policy may be validly grounded on the integrity of county and municipal boundaries. Cf. *Grivetti* v. *Illinois State Electoral Board, supra.*

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[12] The Court indicates in its conclusion that its under-representation is plus 3.8% and its maximum over-representation is only minus 3.4%. However, the Forty-sixth House Legislative District of the Eastern Shore containing the Counties of Accomack and Northampton was allocated one delegate for a population of 43,446 or a deviation of minus 6.5%. These two counties are a part of the Commonwealth of Virginia, cannot be ignored, and must be included in the determination of any variance arrived at in an overall plan of redistricting.

Finally, it bears repeating that in adhering to political boundaries the General Assembly of Virginia came as close as possible to mathematical exactness. There is not in the instant case, as in *Kilgarlin* v. *Hill,* 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967), or *Swann* v. *Adams, supra,* any indication that closer mathematical exactness could be achieved absent obliteration of jurisdictional lines. Since the latter is not required, there is no constitutional requirement that variance in legislative populations be reduced to zero. R. Dixon, *Democratic Representation,* Oxford Univ. Press (1968) p. 446.

It is submitted that, as this Court has previously noted, the congressional standards of mathematical exactness, enunciated in *Kirkpatrick* and *Wells, supra,* do not (and cannot) squarely control appeals concerning state legislative apportionment. *Connor* v. *Williams, supra; Jackman* v. *Bodine, supra.*

Yet substantial questions do arise when considering any applicability of *Kirkpatrick* and *Wells* to state legislative districts as evidenced by the New Jersey Supreme Court turnabout in less than a two year period—a turnabout, it is suggested, due solely to an adherence to numbers. *Scrimminger* v. *Sherwin,* No. A-83, ... A.2d ..... (May 22, 1972).

The court below struck down mathematical deviations of the Virginia plan on the strength of *Kirkpatrick* and *Wells.* These cases, which follow logically from *Wesberry* v. *Sanders, supra,* are inapplicable to Fourteenth Amendment determination. Both the one-man, one-vote requirements in Congressional redistricting cases and the mathematical *exactness* requirements found in those cases have been derived from Article I, Section 2, of the Constitution of the United States. To hold that Fourteenth Amendment requirements now place upon the states the same principles

of exactness, ignores a fundamental concept of federalism.

The most succinct analysis of "the state governments and general governments, acting in *different and independent* capacities for the people" and insuring that "the general government might [not] easily be dissolved," II Elliot's Debates on the Federal Constitution (2d Ed. 1836), p. 367, was set forth by Mr. Justice Black in his opinion in *U.S.* v. *Arizona,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) as follows:

> The Framers of our Constitution provided in Art. I, § 2, that members of the House of Representatives should be elected by the people and that the voters for Representatives should have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Senators were originally to be elected by the state legislatures, but under the Seventeenth Amendment Senators are also elected by the people, and voters for Senators have the same qualifications of voters for Representatives. In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed advisable. This was done in Art. I, § 4, of the Constitution which provides:
>
> > The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; *but the Congress may at any time by Law make or alter such Regulations,* except as to the Place of Choosing Senators. (Emphasis Supplied.)
>
> Moreover, the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause. See *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). In *United States* v. *Classic,* 313 U.S. 299 (1941), where the Court upheld congressional power to regulate the party primaries, Mr.

Justice Stone speaking for the Court construed the interrelation of these clauses of the Constitutional, stating:

> While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." 313 U.S. at 315.

See also *Ex parte Siebold,* 100 U.S. 371 (1879); *Ex parte Yarbrough,* 110 U.S. 651 (1884); *Swafford* v. *Templeton,* 185 U.S. 487 (1902); *Wiley* v. *Sinkler,* 179 U.S. 58 (1900).

The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers "argued that the power given Congress in Art. I, § 4, was meant to be used to vindicate the people's right to equality of representation in the House." *Wesberry* v. *Sanders, supra,* and that Congress would "most probably . . . lay the state off into districts." And in *Colegrove* v. *Green,* 328 U.S. 549 (1946), no justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

Surely no voter *qualification* was more important to the Framers than the *geographical qualification* em-

bodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate "rotton boroughs" and Congress has in fact used its power to prevent States from electing all Congressmen at large.

* * *

In short, the Constitution alloted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them. A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws.

* * *

On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother Harlan has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. My major disagreement with my Brother Harlan is that, while I agree as to the States' power to regulate the elections of their own officials, I believe, contrary to his view, that Congress has the final authority over federal elections. No function is more essential to the separate and independent existence of the States and their governments than the power to determine with the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices. *Pope* v. *Williams*, 193 U.S. 621 (1904); *Minor* v. *Happersett*, 21 Wall. 162 (1874). Moreover, Art. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for

federal offices unless Congress directs otherwise under Art. I, § 4. It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. Amendments Fourteen, Fifteen, Nineteen, and Twenty-Four, each of which has assumed that the States had general supervisory power over state elections, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-Fourth Amendments superfluous. My Brother Brennan's opinion, if carried to its logical conclusion, would, under the guise of insuring equal protection, blot out all state power, leaving the 50 states little more than impotent figureheads. In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.

To require that the mathematical exactness requirements of congressional cases be applied to state redistricting is to exalt an abstract numerical variance into a constitutional command, a command that would nullify the right of a state to choose the legislative structure best suited to its needs; to have balance in a bicameral legislature; and to give an independent voice to the cities and counties it daily governs. Undeniably, "more flexibility . . . [*is*] constitutionally permissible with respect to state legislative appor-

tionment than in congressional districting." *Reynolds* v. *Sims, supra,* at 578.

II.

The Imprecise Creation Of A Multimember Senatorial Seat Was Without Any Constitutional Basis And Further Disrupted Valid Legislative Policy.

In 1964 this Court rejected an assertion that the Commonwealth could constitutionally justify underrepresentation allegedly resulting from the fact that the areas in question contained large numbers of military and military-related personnel. *Davis* v. *Mann, supra,* at 691. Subsequently in *Burns* v. *Richardson, supra,* this Court sustained as permissible the exclusion, not of all military personnel, but of those not meeting a State's residency requirements. In so doing the Court upheld, for state legislative districts, an apportionment base other than total population, i.e., a registered voter base, as long as the results reached would be substantially approximate to some other type of population-based scheme of apportionment such as an eligible voter, citizen, or total population based apportionment scheme.

Sustaining total population as a guide to apportionment of state legislative districts, this Court as to congressional redistricting "question[ed] whether distribution of congressional seats except according to total population can ever be permissible . . . ." *Kirkpatrick* v. *Priesler, supra.* Faced with these court decisions (especially the mandate of *Davis* v. *Mann, supra,* that military personnel must be included) and realizing the legislative responsibility of resolving "[m]any difficult questions of judgment, relating both to policy and to administrative convenience . . . in determining what statistics to use in establishing its apportionment plan,"

Burns v. *Richardson, supra* (Mr. Justice Harlans' concurring opinion at 99), the General Assembly of Virginia used a total population base. People, having substantial contact with the Commonwealth, be they citizen or not, voter or not, were the ones to whom representation was to be afforded. A census of total population is the broadest possible base, and in Virginia, it was the base approved by her recent Commission on Constitutional Revision, Commentaries, Article II, Section 6, p. 118, requiring "representation in proportion to the *population* of the district."

Policy considerations, constitutionally permissible, led the General Assembly to accept and the lower court to arbitrarily reject the following census enumeration.

> The Bureau of Census enumerated approximately 50,000 individuals at the United States Naval Station at Norfolk. It is imperative to remember that such enumeration was not from a sample survey, but from an actual count. Of these individuals approximately 14,000 were stationed physically on land at the base. There is no controversy as to those individuals. The remaining 36,693 were enumerated aboard the ship upon which they were stationed, such ships being "home ported" at the Naval station. The entire Naval station was placed in the Fifth Senatorial District. Since there were no geographical boundaries to the tract containing the enumeration of individuals on home-ported vessels such enumeration, as conceded by appellee Howell, could not be divided. Appellee maintains that though enumerated aboard vessels, many individuals lived elsewhere and that "18,000" of these "home-ported" naval personnel actually reside "for the most part in the City of Norfolk, but to a considerable degree *not* in the Fifth Senatorial District.

With this blithe statement a sample survey on the basis of zip codes alone was given greater priority than an

enumeration[13] of total population, which the General Assembly used to achieve percent variations of minus 0.1%, minus 0.02% and minus 0.2% respectively in enacting the Fifth, Sixth, and Seventh Senatorial Districts. The lower court, not indicating what survey data would be satisfactory, created the only multimember district in the Senate, thus effectively avoiding the General Assembly's policy determination. Further, neither the lower court nor appellee Howell showed whether the sailors in question were or were not citizens of the Commonwealth. Since the General Assembly used the constitutionally permissible base of total population for apportionment of the Senate districts, any assertion by appellee Howell that registered voters in each district did not approximate the population of such district "is insufficient to establish constitutional deficiency." *Burns* v. *Richardson, supra* at 94-5. Consequently no constitutional deficiency has

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[13] Appellants are aware of Mr. Justice Fortas' concurring remarks in *Kirkpatrick, supra* at 539, that:

> Whatever might be the merits of insistence on absolute equality if it could be attained, the majority's pursuit of precision is a search for a will-o'-the-wisp. The fact is that any solution to the apportionment and districting problem is at best an approximation because it is based upon figures which are always to some degree obsolete. No purpose is served by an insistence on precision which is unattainable because of the inherent imprecisions in the population data on which districting must be based.

However, if a "will-o'-the-wisp" approach was ever taken it was T. J. Reed's attempt in this litigation to turn a housing survey into a base for apportionment. (Reed was plaintiff Howell's statistician, and it was he who used a zip code survey to criticize the census enumeration.) His "carefully calculated" survey contained zip codes of post office boxes which he distributed at random; zip codes of streets running through all three senatorial districts, which he distributed at random; and zip codes of cities he did not even know should have been included in the survey. (A. pp. ....). Even assuming a degree of accuracy in Reed's survey, his results show that of the 21,600 who were enumerated as home-ported in the Fifth but lived outside such district, 48%, or over 9,500 persons, maintained residences outside the Fifth, Sixth, or even the Seventh Senatorial Districts.

been shown, nor was the General Assembly arbitrary in relying on the census enumeration.

The decision of the court enunciated an entirely novel principle, that of constitutional requirements without any decisional support. To urge that States may not rely upon the 1970 decennial census but must look behind such enumeration to determine where individuals "reside" in the technical legal sense of the word is unsound. Such a unique requirement is clearly not constitutionally mandated. The approach adopted also limits states and localities in choosing between single multimember legislative districts, necessitating adoption of the latter method of redistricting.

The Senate of Virginia as indicated apportioned itself into forty single-member districts, relying on enumeration figures of the United States Bureau of the Census. The District Court's finding, that the enumeration of Naval personnel was acceptable for Census purposes, but could only be used by Virginia to create a multimember district, requires the Commonwealth, if a legislative policy of single-member districts is to be implemented, to find where Naval personnel actually own or rent a home in the Commonwealth. This means also a determination of where: college students (counted at their school); institutionalized patients (counted at their institution); other military personnel (counted at their base); actually "reside,"—making proper compensation for necessary adjustments. Such a requirement is fraught with difficulties and possible challenges.

The Census in determining manner and methods of enumeration ignores the traditional meanings of domicile and residence and counts an individual not in those terms but where he "lives," i.e., the place to which such individual has the greatest nexus. Consequently, an individual who, for example, is in State Government in Richmond and lives in an apartment or hotel during the week and commutes

home every weekend to his family, home, and place where he votes, is enumerated in Richmond.

The Bureau of the Census decided that the nexus of Naval personnel would be to that place where they were home-ported, and consequently enumerated those individuals at such port. The lower court requires allocation of such individuals, not where the greatest nexus is but where they "reside" without any evidence whether they actually vote at such residence or can be found there a majority of the time.

Appellees in the Senate case did not advocate a different apportionment base be used by the Commonwealth of Virginia. What they did in fact attack was not single-member districts; not the apportionment base; not the use of census data; but the decision of the General Assembly of Virginia to accept the manner in which the United States Bureau of the Census enumerated Naval personnel.

2 U.S.C.A. § 2(a) requires that each fifth Congress be given a statement "showing the whole number of persons in each State" as ascertained by decennial census of the population.

> The phrase "whole number of persons" has been defined historically by the Bureau [of the Census] to include citizens and aliens, persons of voting age and those below voting age, persons who are entitled to vote and those who are not yet entitled to vote, as well as those who have lost the right to vote. *Borough of Bethel Park* v. *Stans,* 319 F.Supp. 971, 973 (W.D. Pa. 1970).

There can be no doubt that the Commonwealth of Virginia views her legislators as charged with representing the views of all those persons so described who are counted in the district. They are not viewed as representing only those who would be eligible to vote for them. Since the Census

enumerates the whole population, the General Assembly was proper in utilizing such data for its reapportionment base.

The latest challenge to the Census Bureau's manner of enumeration was contained in the case of *Borough of Bethel Park* v. *Stans, supra.* The case covers in a comprehensive manner not only the issue raised by plaintiffs regarding enumeration of Naval personnel but also the compatible issues which arise regarding enumeration of students at colleges and inmates at institutions, all of which are enumerated as residents of the places where their respective military installations, colleges and institutions are located. It is therefore, appropriate to quote the case at length:

> Turning to the procedure established by the Director whereby members of the Armed Services serving within the United States, college students and institutional inmates are enumerated as residents of the places where their respective military installations, colleges and institutions are located, the Court finds that this procedure has a rational basis and represents a proper exercise of discretion. The procedure for enumerating such persons is, in each instance, consistent with the governing principle of the Bureau that persons are to be enumerated at their usual place of residence at the time of the census, that place being the one in which they generally eat, sleep, and work, with persons who are temporarily absent for a few days or weeks from such usual place of being counted as residents of their usual place of abode. Thus, the aforementioned groups of persons are enumerated in the same manner as all other persons, including, for example, a professor who has accepted an appointment to teach at a college for one year but does not know where he will be employed the year thereafter or a businessman who has similarly accepted a one-year appointment at a given location.
>
> The Bureau has rejected as unsatisfactory criteria

for enumeration concepts of "domicile," and "legal residence." This is not without justification. Each of these terms connoting a legal status are susceptible of varied definitions in different States and also depending upon the purpose for which the terms are used. To utilize any of these terms susceptible of multiple definitions as criteria for enumeration would be to abandon a uniform standard for the same. Moreover, to determine the legal status of a given individual as a domiciliary or legal resident of a particular State and political subdivision within a State, the census takers would be required to inquire of individuals as to their own judgments as to whether they had acquired such a legal status. Many persons would not be in a position to answer satisfactorily such an inquiry.

The Bureau's governing principle is not without a rational basis. As a matter of the practical administration of the census, the Bureau has found that it can best avoid missing substantial numbers of persons altogether, on the one hand, and the extensive duplication of persons, on the other, by enumerating persons as of their actual place of residence at the time of the census.

Plaintiffs contend, however, that members of the Armed Services within the United States, college students, and inmates of institutions should be enumerated as of their home residences. Home residences, it is contended, could be ascertained from the records of the military installations, colleges and institutions. However, the testimony of Dr. Taeuber evidences that the Bureau has a rational basis for using a method of enumeration other than the one suggested by plaintiffs.

In the case of members of the Armed Forces stationed in the United States, difficulties are presented in enumerating them as of home residences. There are those young men living in their parental home until induction into the Armed Forces and it could be presumed that they will return to their parental home when discharged. There are indications, however, that service in the Armed Forces may lead persons to settle

in a different State on discharge. There are, similarly, young men who have left the parental home, who have married and started families. Presumably, they will return to their families, but frequently their service in the Armed Forces means a change of residence for their families, and it is by no means clear that they will return to their previous address. In addition, there are those young men who have left the parental home and who, prior to induction, are living in apartments or rooming houses. To assign them back to these living quarters, now occupied by someone else would raise the disturbing question as to who are the real residents of the living quarters. Finally, persons making a professional career of service in the Armed Forces may not have any real residence other than in the area in which they are serving.

Plaintiffs contend that those servicemen who have left addresses which are occupied by others on the date of the census at least could be counted back to the smallest political subdivision from whence they came. But, if one considers a serviceman who has left, for example, plaintiff-Borough of Bethel Park, the inaccuracy of such a designation is quite apparent. Bethel Park is a suburb within the metropolitan area of the City of Pittsburgh. If the serviceman's previous address in Bethel Park is occupied by another when he leaves the Armed Services, it is not unlikely, should he desire to return to his "home area," that he would seek residence, for example, in the City of Pittsburgh proper. If he did so, he would become a resident of a congressional district, State legislative districts, and political subdivision different from the ones in which he resided in Bethel Park.

To enumerate college students as of home residences has been found no less of a problem by the Bureau. When the Bureau followed a procedure of enumerating college students as residents of their parental homes, there was evidence that a number of college students were reported neither by their families nor by the col-

leges. Also, college students are a transitional group in the population, and many will not return to the addresses of their parents. Again, as in the case of servicemen, some will not return to their home States. Of those who will return to a home State and even a "home area" within that State there will be, nevertheless, many who acquire residences in congressional and State legislative districts and political subdivisions other than the ones in which they once resided.

Enumerating inmates of institutions as of home residences presents similar and other difficulties. As in the case of servicemen and college students, many will not return to the same address from whence they came. In the case of penal inmates, many have of record no prior address. Inmates of homes for the aged will assume permanent residences there.

In each of these cases, the persons in question draw upon the services of the communities in which their military installations, colleges and institutions are located. The communities in which these persons are to provide for all residents. No abuse of discretion is residing must plan and develop their public resources found in enumerating these persons as inhabitants of these communities rather than as residents of a presumptive home to which many may not be expected to return. Moreover, there is no reason why different criteria should be applied to these persons than are applied to the population at large, many of which may have a status which may be characterized as equally transient on the date of the census.

Plaintiffs also challenge the methods whereby the Bureau enumerates military servicemen and Government personnel abroad as residents of the States from whence they came and not as residents of any particular address or political subdivision within that State. Enumerating these persons as residents of particular addresses or political subdivisions, presents the same problems as previously discussed with regard to military servicemen stationed within the United

States and college students. Although military servicemen and Government personnel abroad may not even return to the State from whence they came, unlike military servicemen and Government personnel living within the United States, these persons cannot be enumerated as of any other State. There are presently a large number of members of the Armed Services abroad and the most feasible method of enumerating them as among the population of the United States is to count them back to the States wherein they were residents before entering the Armed Services.

Plaintiffs further challenge the failure of the bureau to enumerate as residents of either a State or home residence private citizens who are living and working abroad. The short of the matter is that the Bureau has no means of locating these people.

On review of the various methods of enumeration challenged here, the Court finds that plaintiffs have failed to establish that these methods are without rational basis. The mere fact that an alternative method of enumeration may exist does not lead to the conclusion that the method employed is arbitrary or any less within the discretion of the Bureau. Nor does the fact that the Bureau has not conducted a statistical survey to determine how many servicemen, college students and institutional inmates in fact return to home States, political subdivisions or addresses compel the conclusion that the methods employed are without rational basis.

The decisions of the census regarding manner of enumeration have been sustained in numerous attacks, one of the earliest being *United States ex rel Atlanta, Georgia* v. *Steuart*, 47 F.2d 979 (D.C. Cir. 1931), continuing with *Duesing* v. *Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Watson* v. *Gulf Stevedoring Corp.*, 400 F.2d 649 (5th Cir. 1968); *Udall* v. *Washington, Virginia and Maryland Coach Co., Inc.*, 398 F.2d 765 (D.C.

Cir. 1968); *Warren Bank* v. *Camp*, 396 F.2d 52 (6th Cir. 1968); and *Quon* v. *Stans*, 309 F.Supp. 604 (N.D. Cal. 1970).

Not only has the manner of enumeration of the Census been upheld, the census as a base measurement of total population and a proper base for reapportionment has never been declared improper. *Kirkpatrick* v. *Preisler, supra; Burns* v. *Richardson, supra; Davis* v. *Mann, supra; Reynolds* v. *Sims, supra; Wesberry* v. *Sanders, supra,* and more recently, *Chavis* v. *Whitcomb, supra, rev'd on other grounds,* where the three-judge court determined that even in the year 1969 the proper basis for reapportionment would be the 1960 decennial census.

It is submitted that total population is a constitutionally permissible base, *per se*. See *Preisler* v. *Mayor of St. Louis*, 303 F.Supp. 1071 (E.D. Mo. 1969). The reason for the conclusion being constitutional was aptly stated in *Preisler:*

> It cannot be contended seriously that elected officials represent only registered voters. The right to equal representation does not depend upon the extent of a person's political activity or his exercise of political rights.

That the policy of the Commonwealth, in redistricting, is to consider total population, is amply supported. See Article II, Section 6, and Article VII, Section 5, of the Constitution of Virginia; § 15.1-788 of the Code of Virginia (1950) as amended (Chapter 201, 1971 Acts of Assembly) and § 15.1-571, Code of Virginia (1950), as amended (Chapter 200, 1971 Acts of Assembly). Additionally, Chapter 199 of the 1971 Acts of Assembly, enacting § 15.1-37.5, specifically requires that in redistricting of counties, cities and towns wherein members of the governing body are elected from wards:

> . . . the governing body of a county, city, or town shall use population figures of the most recent decennial United States census for such county, city, or town.

What better measure of population could there be than the Census? Simply stated, it cannot be contended, in view of the cited authority and general principles of reasonableness, that the Commonwealth of Virginia was arbitrary in relying upon the manner of enumeration used by the Census Bureau in the count of Naval personnel.

Plaintiffs and the District Court would have the Senate of Virginia redistrict "on a rule of thumb" that approximately fifty percent (50%) of the Naval personnel enumerated in Census Tract 000999 occupy housing elsewhere than the Fifth Senatorial District in which they were enumerated.

First, it must be emphasized that the census count is not a sample but a total count. It is clear from the evidence and undisputed by plaintiffs that Census Tract 000999, the Norfolk Naval Base, could not be divided. It was necesssary to place all Naval personnel in that one census tract. Any other manner of allocation adopted by the Commonwealth of Virginia would have involved revision of the numerous decisions made by the Bureau of Census regarding manner and methods of enumeration and would have led to a morass of litigation. The action of the Virginia General Assembly in adopting the census violated no constitutional rights. As indicated time and time again, the legislature of Virginia represents not voters, it represents all resident individuals. Those individuals enumerated in the census tracts are fully represented and require the representation that any other individual needs regarding urban services such as schools, police and fire protection, streets and highways, and mass transportation.

That these military people had to be counted, as indicated, is undisputed. The manner of counting them, i.e., reliance upon the census, in no way constitutes an invidious discrimination nor denies equal representation to any individual. To require that the City of Norfolk be the only locality in the Commonwealth of Virginia to have a multi-member senatorial district was not only an invasion by the judiciary of the General Assembly's perrogative, but further resulted in a destruction of the balance struck between the Houses in Virginia's bicameral legislature.

The Senate, though single member districting the entire State necessitated some fragmentation, was careful to insure that any political subdivision that was fragmented would nonetheless have an effective voice in the legislative district. Though a portion of Virginia Beach was fragmented, it did have 40,195 of its population combined with 75,764 of Norfolk for a single senatorial district of 115,959, —a minus 0.2% deviation. Now, however, with the Court abolishing the single member districts in Norfolk, the 40,195 individuals are combined with the entire City of Norfolk (307,951).

In short, the General Assembly in relying upon the figures of the Bureau of the Census adopted its method of enumeration. Representation of individuals would be on a total population base, with persons, whether citizens of Virginia or not, receiving such representation at the place determined by the Census to be that at which they had the greatest nexus, the place where their daily lives would be most affected by legislative enactments. If the allocation of Naval personnel was proper for census purposes, it was clearly proper for redistricting purposes. If the concept of "live" used by the Census must be rejected then, prior to any re-

districting, each State legislature must determine "residence" not only of Naval personnel, but all military personnel, college students, and institutionalized inmates at hospitals, prisons, and mental institutions. The concept of one-man, one-vote imposes no such requirement.

The other grounds of attack raised by appellee Howell in the lower court but not fully pursued were that (1) single member districts discriminated against Negroes and (2) that it was a violation of the equal protection clause to have the entire naval base within one district since federal law did not permit campaigning thereon. As to the former, the districts as drawn by the General Assembly neither fenced out blacks, *Gomillion* v. *Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, (1960), nor fenced them in, *Wright* v. *Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). Additionally, such districts received the approval of the Attorney General when reviewed pursuant to Section 5 of the Voting Rights Act of 1965. (J.A. pp. 51, 54). As to the latter, nowhere in the Constitution is it known to Appellants that a candidate has an unlimited right of campaign activity on governmentally owned property.

III.

The Requirement Of The District Court That Elections Be Conducted Only From Districts Mandated By Court Order, Runs Afoul Of Every Decision Of This Court Which Recognizes The Doctrine Of Federalism And Separation Of Powers.

Footnote 4 of *Connor* v. *Bell,* 40 U.S. L.W. 3348 (U.S. Jan. 24, 1972) (mem.) emphasizes what has been taken for granted by this Court and most lower courts since the "political thicket" was entered. The Court stated:

> . . . During the course of this litigation, the District Court has emphasized that "the exercise of this unavoidable judicial duty [drafting and apportionment

> plan] cannot, does not, and will not in any way tie the hands of the Legislature at any time to adopt and enact any plan of its own for the reapportionment of its membership so long as it complies with Constitutional requirements." *Connor* v. *Johnson,* 265 F.Supp. 492, 494, (S.D. Miss. 1967) (emphasis in original). This Court has frequently emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964). See also *Burns* v. *Richardson,* 384 U.S. 73, 85 (1966); *Ely* v. *Klahr,* 403 U.S. 108, 114, n. 6 (1971).

In stark contrast, the unprecedented Order of the court below (J.A. p. 24) requires that:

> 2. . . . members of the Senate and of the House of Delegates of the General Assembly of Virginia be elected from the electoral districts described in said opinion, anything in the existing statutes of the Commonwealth of Virginia to the contrary notwithstanding;
>
> 3. . . . Such of the defendants herein, and their successors in office, as are charged by law with the conduct of said elections, as well as the agents, employees and attorneys thereof, be, and each of them is hereby, enjoined and restrained from conducting any of said elections in any electoral districts except those established and specified in said opinion as aforesaid;

The lower court, moreover, cannot seek any refuge in an assertion that court order redistricting was an "unavoidable judicial duty." The Virginia General Assembly convened in Extra Session in January of 1971 and adopted a plan of

redistricting for its State Senate and House of Delegates, applicable to the 1971 general elections thereby insuring representative participation in the election of its members at the earliest possible moment in the decade of the Seventies.

The Assembly then *recessed* in lieu of adjournment while the plans were presented to the Attorney General pursuant to the Voting Rights Act of 1965, see *Perkins* v. *Mathews,* 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971), and while awaiting the lower court's ruling on constitutional issues raised by the instant suits. The Attorney General interposed certain objections to the plans and as a result the court postponed, on its own motion, any rulings; the Attorney General then withdrew his objections in light of *Chavis* and the court on June 16, 1971, heard the constitutional issues raised; its Order of May 24, 1971, being complied with when all objections raised by the Attorney General as to House districts had been appropriately withdrawn and the Senate plan amended.

Then on June 2, 1971, the lower court entered its Order, making it perfectly clear that the General Assembly need not have waited patiently in recess to correct any constitutional error decreed by the Court; all elections for the General Assembly were to be held from the districts described in the opinion. These matters of "legislative consideration and determination", *Reynolds* v. *Sims, supra,* having been judicially decreed, the General Assembly adjourned on July 19, 1971, with the mandate that an appeal be made to this Court requesting correction of the flagrant abuses of judicial discretion constituted by the district court's action. The Commonwealth's position is that though judicial *determination* of constitutional limitations in redistricting is proper, judicial relief must be restrained.

As stated in *Burns* v. *Richardson, supra:*

> Our decision in *Reynolds* v. *Sims* emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion *after having had an adequate opportunity to do so.*" 377 U.S., at 586, 12 L.Ed.2d at 541. Until this point is reached, a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond a clear command of the Equal Protection Clause. (Emphasis added.)

In the case at bar, the lower court exceeded even the limited restraints placed upon the State of Hawaii in the *Burns* case and mandated that the General Assembly should redistrict no further and that all elections for members of the General Assembly would be held only under those districts devised by the Court.

The district court in Virginia's case abandoned its role of rendering judicial determinations and, without consideration of the propriety of such action, invaded the legislative field, allowed the legislature no opportunity to react to its judicial determination, and ordered into effect its own reapportionment plan. Indeed, though the court in *Reynolds* v. *Sims* ordered into effect a redistricting plan of its own, it did so only as this Court recognized:

> Additionally, the Court below acted with proper judicial restraint, *after the Alabama Legislature had failed to act effectively* in remedying the constitutional deficiencies in the State's legislative apportionment scheme, . . . in prescribing a plan admittedly provisional in purpose so as not to usurp *the primary responsibility for reapportionment which rests with the legislature.* (Emphasis added.)

Even in the previous Virginia reapportionment case of the Sixties, *Davis* v. *Mann, supra,* this Court made clear that legislative reapportionment must be done by the General Assembly, stating:

> *After* the District Court has provided the Virginia legislature with an *adequate opportunity* to enact a valid plan, it can then proceed, should it become necessary, to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme. . . . The court below [could] take further action should the Virginia legislature fail to act promptly in remedying the constitutional defects in the State's legislative apportionment plan.

The ruling of this Court in the case of *Ely* v. *Klahr, supra,* commended and upheld the action of the District Court for the State of Arizona in refraining from interfering with the Arizona legislative plan even though the feared result was that an election would be held under a plan found unconstitutional by the Court. This Court noted and reconfirmed its earlier ruling in *Reynolds* v. *Sims* that:

> Districting and apportionment are legislative tasks in the first instance, and the Court did not err *in giving the legislature a reasonable time to act* based on the 1970 census figures which the Court felt would be available in the summer of 1971.

Because of varied aspersions upon the Commonwealth, in attempts to relive history and ignore the issue before the Court, it is necessary to point out: that past history of Virginia did not require an "understanding" test (requiring applicants to demonstrate their ability to read and explain provisions of, usually, a state Constitution) (see Debates, Const. Conv. 2937-40, 3076-77 (1901-02) where such a proposal was rejected); that literacy test requirements

(apply to register in one's own handwriting) were never found to be administered discriminatorily (See 1961 Report Civil Rights Commission, Vol. I, pp. 22, 102); that poll tax requirements were never administered or struck down as discriminatory, see *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); and that allegations of recalcitrance in the reapportionment area are simply unfounded. Reapportionment history in the Commonwealth lends no substance to fears that elections would be held under unconstitutional plans. *Ely* v. *Klahr, supra.* A comparison of redistricting in the Commonwealth with the recent decision of *Sims* v. *Amos,* 340 F.Supp. 691, (M.D. Ala. 1972) substantiates that any such claims are unfounded.

A cursory reading of the *Sims* decision points to the dichotomy between a judicial decision of constitutional issues and the anomalous decision in the instant suit constituting an unwarranted flex of judicial muscle. The entire opinion of the Virginia District Court is summed up in their last statement. The courts' decision does not "judicially" opine but simply "legislatively" redraws districts with the blithe announcement that their apportionment "is the best [they] can devise."

Virginia's is not a case arising, as was *Sims,* from a legislature's lack of adherence to the command of its own state constitution. It is not a case arising, as was *Sims,* from a seventh decade of inaction in the legislative reapportionment field. In fact Virginia has continuously redistricted decennially and by faithfully following the mandate of her Constitution ranked eighth in the United States in fairness of representation based solely upon population, prior to 1961 when the major reapportionment decisions were rendered by this Court. *Davis* v. *Mann, supra.*

The district court in *Sims* v. *Amos,* studiously set forth the history of Alabama redistricting in order to justify its intervention into a legislative responsibility. It emphasized:

> This Court always has recognized that the primary responsibility for reapportionment rests with the Legislature and that no action on the part of this Court, which is not absolutely essential for the protection of plaintiff's constitutional rights, should be taken before the Legislature of Alabama has had a reasonable opportunity to comply with its duty. *Sims* v. *Frink,* 208 F.Supp. 431 (M.D. Ala. 1962). Indeed, the history of the present litigation reflects a trend of protracted judicial restraint, this Court acting only when confronted with totally inadequate legislative responses to, or complete disregard by the Legislature for, its constitutional mandate. The following is a cursory survey of that history.

The court then proceeded to outline the legislative responses to redistricting orders, and *only then,* by showing the inadequacy of such response, did it deem its own plan, which was drawn by the plaintiffs and upon which defendants had ample opportunity to comment. The justified protracted judicial restraint of the Alabama district court stands in stark contrast to the actions of the lower court in this litigation.

Faced with no defense but only with a concession as to malapportionment, the district court in *Sims* v. *Amos,* rejected Alabama's request that, given more time, that state would effect the required reapportionment. It is appropriate that the reasons for such rejection be set forth herein at length.

> Although the Constitution of Alabama required the Legislature to reapportion in accordance with the latest available federal census, prior to the initiation of the present litigation in 1961, *Sims* v. *Frink,* the last time

the Legislature had reapportioned was in 1901. Sixty years and six decennial federal enumerations of the population of Alabama had passed without the Legislature having adhered to the command of its own State's Constitution. Nevertheless, in 1962, when plaintiffs in *Sims* sought an interlocutory injunction prohibiting defendants from holding primary elections in the malapportioned districts, this Court acknowledged the primacy of the Legislature's role in reapportionment and, although it retained jurisdiction, refused to issue the injunction, stating "[t]here [still] is time [before the general election] for the Legislature of Alabama to comply with its duty. . . ." But having been afforded this additional reasonable opportunity to provide a fair and proper reapportionment, the Alabama Legislature again failed to remedy the "invidious discrimination" ingrained in the apportionment of the State's legislative districts. At that time this Court would have been justified in instituting a complete reapportionment plan of its own. Instead, however, recognizing the delicate relationship between federal courts and state legislatures, this Court effected only the minimum changes considered necessary to release the "stranglehold" on the Legislature and to permit it to reapportion itself in time to conduct the 1966 election of Alabama legislators. In this connection it was observed:

> The Court hopes that the moderate steps taken by this order may be enough to break the stranglehold. They certainly will not suffice as any permanent reapportionment. If they should prove insufficient to break the stranglehold, the Court remains under the solemn duty to relieve the plaintiffs and other citizens like situated from further denial of the equal protection of the laws. That much must be accomplished before there can be a final disposition of this case.
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> 208 F.Supp. at 442.

Again jurisdiction of the case was expressly retained, and after the United States Supreme Court, in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), affirmed this Court's action, it remanded the case for further proceedings, specifically directing this Court "to take some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim . . . ," that is, in time to be used as the basis for conducting the 1966 election of State legislators. Subsequent to that decision, and because the Legislature again had failed to reapportion itself, this Court, in July of 1965, ordered the parties in *Sims* to file "their proposals for a judicial remedy designed to eliminate the 'invidious discrimination' presently existing in both Houses of the Legislature. . . ." Thereafter, the Alabama Legislature convened in special session and enacted bills to reapportion both the Senate and the House of Representatives. This Court accorded each of those acts "the most careful scrutiny and consideration," focusing on the constitutional prerequisite that reapportionment must be substantially on a population basis. *Reynolds* v. *Sims,* 377 U.S. at 568; Alabama Const. art. 5, § 200 (1901). In its decision, filed on October 2, 1965, this Court adopted the multi-member district senatorial scheme of the Legislature, but, because it found the Legislature's House plan discriminatory against Negroes, it provided an alternative plan of multi-member House of Representative districts. *Sims* v. *Baggett, supra.* This Court retained jurisdiction and order that:

> . . . the apportionment of the Alabama Legislature as herein ordered remained in effect without change, except by order of this Court, until the Legislature of the State of Alabama reapportions itself . . . after the next decennial census to be conducted in 1970. . . . [Unpublished decree.]

The next chapter in the development of the present litigation began in January of 1970, when certain

"Negro-Americans" residing in the "predominantly Negro ghetto areas" of Montgomery, Mobile and Jefferson Counties filed a class action seeking preliminary and permanent injunctions against the election of State legislators from these three counties on a county-at-large basis. Plaintiffs contended that multi-member districting operated to minimize and cancel out their voting strength to the extent that they were deprived of equal protection of the laws and of the rights guaranteed them by the Fifteenth Amendment to the United States Constitution. Although this Court refused to issue a preliminary injuncion because "it would be unreasonable and unwise to require any legislative reapportionment prior to the time fixed in [*Sims* v. *Baggett*], that is prior to the first legislative session following the completion of the 1970 decennial census," this Court did order that jurisdiction be retained, that a hearing on the merits be postponed and that defendants' motions to be dismissed be denied. In so ordering, the Court commented upon the merits of plaintiffs' complaint:

> . . . In our opinion, however, the evo evidence offered in support of the plaintiffs' claim, if such evidence is substantiated by the 1970 decennial census and by the further evidence then available, makes out a strong case for the consideration of the Legislature of Alabama.

Nixon v. *Brewer*, 49 F.R.D. 122, 126 (M.D. Ala. 1970).

Following this order and the ensuing completion of the 1970 census, several events occurred in rapid succession. First, in June of 1971, plaintiff Peters filed a class action in the Northern District of Alabama, asking that the State Legislature be reapportioned and that mid-term elections be held. On July 12, plaintiffs in *Nixon* and *Sims* filed a motion for consolidation and asked for relief similar to that requested in *Peters*.

Ten days later this Court granted the motion to consolidate and issued an order requiring defendants to show cause why the Legislature was not under a mandatory constitutional duty to reapportion and if the Legislature should fail to perform its duty, why this Court would not then be under a duty to reapportion the Legislature constitutionally. On Septmber 20, 1971, *Peters* was consolidated with *Sims* and *Nixon*.

Despite this Court's observation in *Nixon* v. *Brewer* that plaintiffs' complaint made out a strong case, despite the 1970 census' clearly substantiating plaintiffs' claims, and despite the events set out above, the 1971 General Session of the Alabama Legislature adjourned without having met the mandates of both the Alabama and Federal Constitution concerning reapportionment. On October 8, 1971, this Court set these three cases for hearing to commence December 2, 1971, and expressly notified the Legislature that it had until that date to enact a plan. Although the Legislature has convened since in special session, it has continued to fail to discharge its duty. With the *Nixon* plaintiffs' amendment of November 22, 1971, which added to the prayer for relief a request for statewide single-member legislative districts, this litigation assumed its present posture. The Court proceeds, therefore, to the merits.

In contrast to the above Virginia has, as an example, faithfully and consistently redistricted in Congressional (Acts of Assembly 1891-92, p. 348; 1906, p. 40; 1912, p. 156; 1932, p. 20; 1934, p. 17; 1948, p. 802; 1952, c. 282; 1958, c. 333; 1964, c. 536; 1971, c. 118), Senatorial (1891-92, p. 56; 1901-2, p. 800; 1922, p. 463; 1934, p. 252; 1942 c. 387; 1952, c. 17; Ex. Sess. 1958, c. 333; 1962, c. 635; 1964 Ex Sess. c. 1; 1971, cc. 120, 246), and House of Delegates legislative seats (1891-92, p. 56; 1901-2, p. 800; 1922, p. 463; 1932, p. 337; 1942, c. 387; 1952, Ex. Sess.,

c. 18; 1958, c. 333; 1962, c. 638; 1964, Ex. Sess. c. 2; 1971, c. 116).[14]

The original redistricting litigation, instituted in the Commonwealth, *Mann* v. *Davis,* 213 F.Supp. 577 (E.D. Va. 1962), following the 1960 census was brought to test the validity of the then recently passed redistricting acts (1962 Acts of Assembly cc. 635, 638), not to cure inaction. Upon this Court's decision in *Davis* v. *Mann, supra,* the General Assembly of Virginia immediately in extra session (1964 Acts of Assembly Ex. Sess. cc. 1, 2) passed new redistricting acts, varying significantly from the minimal changes of the 1962 acts, which 1964 acts were approved by this Court. *Mann* v. *Davis,* 245 F.Supp. 241 (E.D. Va. 1965), *aff'd,* 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed.2d 35 (1965). The federal district courts in Virginia have never been confronted, as was the Alabama district court in 1966, with no alternative except to design a judicial remedy. And even in 1966, the Alabama court, faced with such a dilemma, requested and sought proposals for redistricting.

In 1971, the instant suit, as in 1963, was brought to test the validity of the new redistricting, not as in Alabama, to prohibit malapportionment due to inaction. As previously indicated the 1971 Acts were purposely passed to achieve proper representation for the greatest length of time possible in the decade of the seventies. Further the General Assembly at its 1971 session never adjourned but recessed until the validity of its reapportionment acts could be fully tested. The one admonition given by the District Court—to cor-

[14] Though some may argue that the General Assembly was not consistent, since it adjourned in 1952 without redistricting, (it did enact a congressional plan) the mandate of the Commonwealth's Constitution was nevertheless met through the executive branch, convening a special session wherein the legislature, not the judicial branches of government, adopted a reapportionment scheme for House of Delegate and Senatorial legislative seats.

rect the objections the Attorney General interposed under the Voting Rights Act of 1965, 42 U.S.C. 1973, *et seq.*— was quickly met when a line dividing Senate Districts Five and Six was redrawn and the Attorney General's sole objection to the Senate plan withdrawn.

The arguments by some that the General Assembly should have cured all complaints fail to realize that redistricting cannot please all political elements and individuals of a state. Divergent complaints, impossible to reconcile, were heard from many quarters such as the DuVal request for single member districts and the Parris request for one multimember district for the same area. The General Assembly was, therefore, more than justified in following the order of the lower court with regard to mooting the objections to the Attorney General and in awaiting the decision of such court as to the constitutional issues raised by appellees. It is regretful that such a wait was for naught and that the district court never informed the General Assembly in what manner, if any, the legislative redistricting acts were constitutionally deficient, but merely announced its own restructuring.

The lower court in fact never really ruled upon the constitutional issues presented, but looked upon the whole litigation as culminating in "judicial" reapportionment. The necessity of providing "the Virginia Legislature with an adequate opportunity to enact a valid plan," as mandated by this Court in *Davis* v. *Mann, supra,* was ignored. Clearly, the absence in Virginia, of the justification as outlined in *Sims* v. *Amos, supra,* emphasizes the error of the district court, and requires reversal.

IV.

The Voting Rights Act Allegations Raised In The Thornton Appeal, Coupled With Allegations Of Fourteenth Amendment Denial, Are Without Merit.

Undaunted by previous failure, the black plaintiff intervenors seek, in what is considered the "second round" of reapportionment litigation. (see R. Dixon, *Democratic Representation, supra*), exactly what this Court previously rejected in the "first round" of reapportionment litigation. *Thornton* v. *Davis,* 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed.2d 35 (1965).[15] Black appellants understand *Whitcomb* v. *Chavis, supra.* They are demonstrably unable to show that the multimember district of the City of Richmond or similar districts throughout the Commonwealth, "were conceived or operated as purposeful devices to further racial or economic discrimination."

Virginia's House of Delegates has maintained a tradition, sanctioned by this Court, of not obliterating the traditional integrity of city and county lines. *Davis* v. *Mann, supra; Mann* v. *Davis, supra.* Nor can it be alleged that, as to the city of Richmond, the multimember district, which encompasses the newly annexed area, was manipulated to cancel out the voting strength of Richmond's blacks. Such multimember district received the approval of the Attorney General; a multimember district for the same city was, as indicated, previously upheld; the city has consistently had multimember House seats; and the new annexation itself

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[15] Despite footnote 22 in *Whitcomb* v. *Chavis, supra,* this Court has had before it on appeal the objections (that the multimember district then created for the City of Richmond deprived Negro citizens of a chance to elect one of their race to the General Assembly) were rejected by the lower court and such lower court's action summarily affirmed by this Court. See, *Mann* v. *Davis,* 245 F.Supp. 241 (E.D. Va. 1965), *aff'd sub. nom.,* 382 U.S. 42 (1965).

"firmly rested on non-racial grounds." *Holt* v. *City of Richmond,* ..... F.2d ..... (Nos. 71-2185-86) (4th Cir. 1972), *cert. denied,* ..... U.S. ..... (June 26, 1972). No violation of any Fifteenth Amendment right was worked by annexation.

What, therefore, do black appellants have left by way of Fourteenth Amendment claims? They allege, and thus concede in the same breath, that these claims may have validity only if the burden of proof is on the Commonwealth to demonstrate that multimember districts do not invidiously discriminate. In other words, black appellants admit that they themselves are unable to prove discrimination.

The only basis for contending that Virginia is different from her sister State of Indiana is that Virginia is subject to the Voting Rights Act, 42 U.S.C. § 1973(c). Any reply that the Commonwealth has complied with the provisions of the Act is met with the assertions that the Attorney General of the United States erred in withdrawing his objection and that, in any event, since there has been discrimination in the past, Virginia should prove the absence of discrimination in the present. The first proposition is based on a faulty reading of the Act. Unless this Court believes that its role is not merely the effectuation of constitutional command, but the expiation of sin, it must also reject the second.

The thrust of black appellants' argument is now, as it was in 1965, that they are entitled to guaranteed election of their "own" representatives, through mandatory single-member districts. Statistics were introduced showing the proportions of black population in various localities, and unsuccessful black candidacies in such localities, as if this showing, constituted a prima facie case that the Commonwealth's apportionment should be upset. This Court held a similar contention to be without merit in *Whitcomb* v.

Chavis, supra, when it succinctly stated the age-old truth that is the very foundation of democracy: one candidate wins and the others lose. Hopefully the most qualified candidate is the successful one, but regardless of qualification the candidate who represents the wishes of the *majority* of his electorate is elected. Anything less would be less than a democracy.

Whether a particular result was reaffirmed by racial prejudice on the part of the voters may be argued but will never be known. The democratic process of majority rule and secret ballot necessarily permits expansion of varying motivations from the admirable to the despicable. Black appellants urge a change in the rules governing this process. This Court has stated quite clearly in *Whitcomb* v. *Chavis, supra,* that no reading of the Constitution can permit the absolute guarantee of political victory to any group. The Voting Rights Act being applicate to election *practices,* not election *principles,* this precept is just as valid in states covered by the Act as it is in the rest of the nation.

The position of black appellants regarding single-member districts that the failure of the General Assembly to partition the city of Richmond and other cities with significant black population into subdistricts of substantially equal population abridges rights secured to them by the Fourteenth Amendment to the Constitution of the United States. In considering the "subdistricting" aspect of black appellants' position, it must be stressed at the outset that their argument is founded exclusively upon *race.* The *racial* composition of the inhabitants of one or more of the subdistricts which it is alleged would result from such partitioning is the reason which must be nakedly advanced as the sole basis for their contention. Black appellants argue that the failure of the General Assembly and the lower court to

partition the cities of Richmond, Norfolk, Hampton, Newport News and Portsmouth results in a dilution of the voting effectiveness of Negroes who might reside in such subdistricts.

Initially, it should be emphasized that this assertion of black appellants constitutes a *non sequitur*. As citizens of multimember house districts entitled to vote for delegates, Negroes in, for example, the city of Richmond, have a voice in the selection of nine members of the General Assembly of Virginia including three single-member senatorial seats. This voice is substantial, effective and frequently decisive. If the General Assembly were to partition the city of Richmond into subdistricts—in the manner hypothesized by appellants—that voice would effectively be stilled in the selection of most of the representatives under consideration. If the General Assembly had partioned the city of Richmond into subdistricts, it would have been equally arguable by other black plaintiff-intervenors that the General Assembly "ghettoized" them into districts which would have substantially diluted the effectiveness of their votes. See *Wright* v. *Rockefeller, supra.*

Moreover, if the Constitution of the United States requires that multimember districts of cities containing substantial black population be partitioned into component subdistricts of substantially equal population for the purpose of representation in the General Assembly of Virginia, why does not the same Constitution equally require subdistricting of all other multimember house districts? Manifestly, counsel for black appellants do not argue that the Constitution imposes the latter requirements. Such an assertion would be tantamount to the proposition that multimember districts are *per se* unconstitutional. This contention runs squarely counter to this Court's express approval of such districts in

Reynolds v. *Sims, supra; Fortson* v. *Dorsey, supra;* and *Whitcomb* v. *Chavis, supra.*

Rather, counsel for appellants contend that the Constitution requires partitioning of a multimember district *only* in those instances in which such partitioning might give rise to a district in which Negroes will predominate and Negroes would then be able to elect a representative of their own.

Thus race alone, *i.e.,* the *racial* composition of the inhabitants of a resulting subdistrict, is the openly acknowledged foundation upon which the asserted constitutional principle is constructed. Absent the possibility of the formation of such a *racial* subdivision, the principle for which black appellants contend would have no application.

It is inconceivable to counsel for the Commonwealth that this Court would lend its imprimatur to an essentially racist constitutional rule. Certainly it declined to do so in affirming the following dispositive declaration of the district court in *Mann* v. *Davis, supra:*

> *Neither Richmond, nor any other city or county in Virginia has in her history ever been sub-districted. Even councilmen for the local government of Richmond are elected at large, and this without question by either race.*
>
> The concept of "one person, one vote" we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color.
>
> As Justice Douglas, though in dissent but obviously undeniably, tartly put it in Wright v. Rockefeller, 376 U.S. 52, 62, 66 (1964):
>
> > *"The fact that Negro political leaders find advantage in this nearly solid Negro* and Puerto Rican *district is irrelevant to our problem.* Rotten boroughs

were long a curse of democratic processes. Racial boroughs are also at war with democratic standards."

Page 66:

". . . The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . .Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines. . . ." (Italics supplied.)

Let it also be clear what the black appellants' assertion is as to the withdrawal, by the Attorney General, of his objection to multimember districts previously interposed. Their true complaint is that they disagree with the Attorney General and do not relish being in a lawsuit where they have to prove their allegations. Black appellants' position is simply not supported by the plain language and intent of the Voting Rights Act. Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 84 Stat. 315, 42 U.S.C. § 1973(c), first provides that a state, upon proposing an alteration of voting procedures such as involved in reapportionment, may institute an action for declaratory judgment in the United States District Court for the District of Columbia. The statute then reads:

. . . Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and

> the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . .

As this Court's very language in *Allen* v. *State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), points out:

> The provision for submission to the Attorney General merely gives the covered State *a rapid method* of rendering a new state election law enforceable. Once the State has successfully complied with the § 5 approval requirements, *private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by* § 5. (Emphasis added.)

Once Virginia has complied with all laws in submitting her redistricting plans to the Attorney General of the United States and, having met the burdens imposed by the Voting Rights Act, she is entitled to stand equal with other sovereign states. A private party, in a "traditional suit" has the "traditional" burden, reaffirmed in *Whitcomb* v. *Chavis, supra,* of proving his allegations. This requirement, black appellants concede, they have failed to meet. They have demonstrated no more than a "euphemism for political defeat" as in the Indiana case.

The assertion that the Attorney General acted improperly in withdrawing his objections to Virginia's apportionment plans after this Court's decision in *Whitcomb* v. *Chavis, supra,* is not properly made. Although black appellants ignore the Attorney General's letter of objection, it cannot

be denied that the original (and sole) reason for the objection to the multimember districts in five cities was the lower court's decision in *Chavis* v. *Whitcomb, supra.* When that decision was reversed by this Court, the authority on which the objections were based no longer existed, and the Attorney General would have been arbitrary indeed if he had continued to rely on his original letter. Black appellants maintain, however, that this Court's action in *Whitcomb* v. *Chavis, supra,* did nothing to change the basic principle that multimember districts are unconstitutional where they dilute minority votes, *cf. Fortson* v. *Dorsey, supra, Burns* v. *Richardson, supra,* and that the Attorney General should have continued his objections on these grounds.

In making this assertion, black appellants both misapply the cases and misconstrue the Attorney General's role. *Fortson* and *Burns* were Fourteenth Amendment cases, not Voting Rights Act cases, which stand for the proposition that multimember districts may not be utilized if they are *proved* to result in invidious discrimination. The burden of proof of such results does not shift in a Fourteenth Amendment "one-man, one-vote" case merely because it involves a Voting Rights Act state. The Commonwealth complied with all requirements established by the Act in making the submission to the Attorney General. The manner in which the Attorney General construes applicable law has no bearing on whether the Commonwealth fully discharged her legal obligation; she clearly did so. The Voting Rights Act provides no "appeal" from the Attorney General and a covered state, which properly submits new procedures, cannot be penalized because the Attorney General reaches one conclusion rather than another or, as in the case of *State Board of Election Comm's* v. *Evers,* 327 F.Supp. 640 (S.D. Miss. 1971), *appeal dismissed,* 92 S.Ct. 1281 (1972), no decision at all.

As Mr. Justice Blackman, joined by Mr. Justice Rehnquist, stated in the *Evers* case, commenting on the district court's holding that a state must do more than merely make a submission:

> I am unable so to read § 5 of the Voting Rights Act of 1965, and I cannot subscribe to the District Court's reasoning. Section 5, it seems to me, plainly and clearly provides that if the procedure has been properly submitted to the Attorney General, as it was, (and the Attorney General has not interposed an objection within sixty days after such submission), as he did not, the proposed statutory changes may be enforced without the court proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney General and he took no action by way of interposing an objection within the allowed 60 days, I do not see how the statute can be read or construed in any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was therefore enforceable subject, of course, to the statute's recognized exception as to any contest on the merits. I see nothing in Perkins v. Matthews, 400 U.S. 379, 385 (1971), which supports a contrary conclusion. In my view the District Court's holding, when it equated nonaction by the Attorney General with the interposition by him of an objection is without foundation in the statute.

If this Court feels black appellants are correct in their contention that the Attorney General erred in withdrawing his objection, they must nonetheless reject such assertion since the Attorney General never interposed a *timely* objection. The submission of Virginia's reapportionment legislation was initially made on March 1, 1971, and, pursuant to a request received on March 18th additional material

was forwarded on March 22nd. The objection of the Attorney General was received on May 7, 1971, more than sixty days from the date of the initial submission. The position of the Attorney General was that the sixty-day period did not commence until the additional requested material was received.

With the promulgation on September 10, 1971, of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. §§ 51.1, *et seq.*, and the adoption of § 51.18, the Attorney General has attempted to make his position sustainable. It clearly was not in May of 1971, prior to the existence of such procedure, when sixty days indisputably meant sixty days. As held by the district court in *Vinik* v. *Smyth,* ..... F.Supp. ..... (No. 7189) (D. Ariz. 1971), in considering new regulations:

> . . . Those guidelines purport to define what constitutes a "submission" for the purpose of commencing the 60 day period and to give the Attorney General of the United States the authority to extend the time if the "submission" is considered insufficient by the guidelines as interpreted by the Attorney General.
>
> The effect of the guidelines is to make indefinite and uncertain the language and meaning of a statute which is relatively clear.
>
> * * *
>
> It would appear that the Congressional intent behind § 5 of the Voting Rights Act of 1965, as amended, was to provide for the early resolution of questions related to the validity of revisions of election laws of the several states and the political subdivisions thereof. In *Allen* v. *State Board of Elections, supra,* the Court stated (393 U.S. 549),
>
> > "The provision for submission to the Attorney General merely gives the covered state *a rapid method* of rendering a new state decision law enforceable." (Emphasis supplied.)

> We do not reach the question as to the authority of the Department of Justice to extend the 60 day period by the promulgation of proposed guidelines to the administration of Section 5. They were not in force and effect as of the date of this submission. We hold that the Attorney General of Arizona complied with the provisions of § 5 by his submission on July 8, 1971; that the 60 day period provided in § 5 of the Voting Rights Act of 1965, terminated upon the expiration of 60 days from the receipt of the submission by the Attorney General of the United States, i.e., September 10, 1971; that the Attorney General of the United States has not interposed an objection within the 60 day period following submission, and therefore, the Arizona law, Chapter 151 of the Laws of 1970, may be enforced.

The Commonwealth does not dispute the right of the Attorney General of the United States to request additional information in order that he may comprehensively analyze the change submitted, nor his right to take, after the sixty-day period, appropriate legal steps in a proper court to enjoin enforcement of a change. The Commonwealth's position is simply that sixty days is still sixty days. Unless the Attorney General of the United States interposes an objection to a change within the allotted time, then the change may be enforced unless the Attorney General or a private party succeeds in obtaining an injunction with respect to such implementation.

Any analysis of Section 5 and the reason for the sixty-day period must of necessity be made with due regard to the nature of the Voting Rights Act, which was explicitly set forth by Mr. Justice Black as follows:

> Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our con-

stitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. * * * A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 358-360, 15 L.Ed.2d 769, 86 S.Ct. 803 (1966).

While recognizing the intrusion into the power of the States which Section 5 constitutes, this Court found that Congress, under the compulsion of unique circumstances documented by legislative history, responded in a permissibly constitutional manner. Yet that intrusion was tempered, for under Section 5 it is not necessary that a covered State obtain a declaratory judgment action before it can enforce any change in its election law. Congress' legitimate concern regarding its potential disruptive effect on State governmental operations is reflected in the provision for submission to the Attorney General as a rapid method of rendering a new law enforceable.

This Court has confirmed the sixty-day period as a means of rapid review fully cognizant of the breadth and type of changes which must be submitted to the Attorney General. See *Perkins* v. *Mathews, supra.* Additionally, the legislative history shows no congressional intent contrary to the proposition that the sixty-day period in question means sixty days. See *"Legislative History of Voting Clearance Procedure Authorized By Sections 3(c) and 5 of the 1965 Voting Rights Act,"* (A. p. .....). Not only does the legislative history of the 1965 Act provide no justification for this Court's extending the sixty-day period, the legislative history of the 1970 Amendments to the Voting Rights Act confirms that the sixty days commence upon the date of any submission.

When amendments to the 1965 Voting Rights Act were being proposed in the 91st Congress, the Attorney General of the United States requested five amendments to the Act. The fourth amendment proposed is pertinent to a consideration of the sixty day period. In that request the Attorney General asked that the submission requirements of Section 5 of the Act be abolished and that "the courts, on application of the Attorney General, would be permitted to temporarily enjoin discriminatory voting laws and to freeze any new voting laws passed by the State or county against whom the law suit is filed." The Attorney General gave the rationale behind this recommendation to be:

> Because of the nature of elections and the fact that it is difficult at a much later date to correct the result of any illegal inequities, I believe that the Attorney General should have the discretion, in cases which appear to have serious consequences, to ask the Court to temporarily freeze the situation in a particular county.
>
> This was basically the philosophy adopted by the 1965 Voting Rights Act which provided that no elec-

tion laws passed by States covered by the Act could be changed without approval of either the courts or the Attorney General. In contrast to the 1965 Act, our proposal leaves the decision to the court, where it belongs; and properly places the burden of proof on the government and not the States.

The reasoning for replacing Section 5 of the Act with the Attorney General's suggested changes was fully set forth:

> The pre-clearance requirements of Section 5 of the 1965 Act has been difficult to administer effectively. To date there have been some 345 submissions to the Department of Justice. *We have sixty days to determine if a law has a discriminatory purpose or effect. Unless we are extremely familiar with the political structure of a given jurisdiction or are capable of detailing investigators to make appropriate inquiry or receive complaints from local sources—it is virtually impossible to know if changes in the rules of a state election board, relocation of a polling place, consolidation of an election district, or some technical change in the election laws has such a discriminatory purpose or effect.* 91st Cong. 2d Sess., Vol. 116, Congressional Record, No. 30, p. S2752-53.

It is thus clear from legislative history that (1) there can be no meaning applicable to the sixty day period other than it ends sixty days from initial submission and that (2) Congress very clearly realized the amount of work required by the Attorney General in order to comprehensively review material within the sixty day period; that the Attorney General desired the sixty day period abolished because of the problems of administrative review; that nevertheless Congress did not abolish the sixty day submission period; and that Congress intended to have the Attorney General

continue his administrative review in the period aforementioned.

Since with respect to the House reapportionment plan here in question the Attorney General interposed no objection within the sixty day period provided by Section 5 of the Act, the plan became enforceable on May 1, 1971, in the absence of any court order to the contrary, and the Attorney General's subsequent raising of objection on May 7, 1971, and his withdrawal of objection on June 10, 1971, were without legal effect.

In conclusion, the Commonwealth has fully complied with the requirements of the Voting Rights Act as to the legislative reapportionment plans adopted by her General Assembly. Black appellants, faced with a "traditional suit", have failed to carry their burden of proving the eixstence of invidious discrimination. The plans, therefore, pass muster under both the Act and the Fourteenth Amendment.

CONCLUSION

Nothing in the Federal Constitution nor past decisions of this Court prevents a State from choosing a legislative structure it deems best suited to the interests, temper and customs of its people provided population equality is maintained. The Virginia General Assembly chose carefully the thesis of its plan—single member districts in its upper chamber and recognition of political jurisdictions in its lower chamber. The plans adopted were ones with the least population deviation the thesis would permit. The lower court unjustifiably discarded Virginia's plans in the Senate, on a theory which rejects legislative adoption of the Bureau of Census' method of enumeration and in the House of Delegates on a theory based on the tyranny of numbers. If state governments, are to continue structuring themselves in the

manner they see fit, consistent with applicable constitutional principles, such doctrines cannot stand. Additionally, the District Court in the face of all authority judicially decreed what has always been deemed primarily a task for legislative consideration and determination, locking in for the decade of the Seventies a plan devised by four individuals without hearings and substituted for the judgment of one hundred forty individual all of whom represented constituencies which make the Commonwealth of Virginia what it is—people, not numbers.

It is respectfully requested that the Court dismiss the appeal of the black appellants and affirm the validity of the legislative apportionment plans adopted by the General Assembly of Virginia at its 1971 session. In the alternative, this Court should reverse the decision of the lower court and require that the General Assembly be given an adequate opportunity to correct such constitutional deficiencies in the said plans as may be found.

Respectfully submitted,

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CERTIFICATE

I, Anthony F. Troy, Special Assistant to the Attorney General for the Commonwealth of Virginia, a member of the bar of the Supreme Court of the United States, and one of counsel for appellants, hereby certify that three (3) copies of the foregoing Brief on Behalf of Appellants as well as three (3) copies of Appendix were on this 30th day of June, 1972, mailed to Edmund D. Campbell, Esquire, Counsel for Appellees Clive L. DuVal, II, et al., 1425 H. Street, N.W., Suite 822, Washington, D.C. 20005; Stanford E. Parris, Esquire, Counsel for Appellees Stanford E. Parris, et al., 4085 Chain Bridge Road, Fairfax, Virginia 22030; The Honorable Gordon B. Tayloe, Jr,, Assistant City Attorney of the City of Norfolk, Counsel for Defendant-Intervenor City of Norfolk, 908 City Hall Building, Norfolk, Virginia 23501; John Ashton, Esquire, Counsel for Defendant-Intervenor City of Virginia Beach, Hunton, Williams, Gay, Powell and Gibson, P. O. Box 1535, Richmond, Virginia 23212; The Honorable Henry E. Howell, Jr., Counsel for Appellees Henry E. Howell, Jr., et al., 808 Maritime Tower, Norfolk, Virginia 23510; Armand Derfner, Esquire, Lawyers' Committee for Civil Rights Under Law, 520 Woodward Building, 733-15th Street, N.W., Washington, D. C. 20005, Counsel for Plaintiff-Intervenors William S. Thornton, et al. All parties required to be served have been served.

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In The

Supreme Court of the United States

No. 71-373

CITY OF VIRGINIA BEACH,
Appellant,
v.
HENRY E. HOWELL, JR., ET AL.,
Appellees.

and

CITY OF VIRGINIA BEACH,
Appellant,
v.
STANFORD E. PARRIS, ET AL.,
Appellees.

and

CITY OF VIRGINIA BEACH,
Appellant,
v.
CLIVE L. DuVAL, II, ET AL.,
Appellees.

On Direct Appeal from the United States District Court for the Eastern District of Virginia

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BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court (J. App. 1-22) is reported at 330 F. Supp. 1138.[1]

[1] The material printed in the Joint Appendix filed with the jurisdictional statement has not been reprinted in the Appendix filed with this Brief. The Joint Appendix will be designated "J.App." and the Appendix filed with this Brief will be designated "App."

JURISDICTION

The three suits involved in this appeal were instituted in the United States District Court for the Eastern District of Virginia to test the constitutionality of the Acts of the General Assembly of Virginia reapportioning the State, as a result of the 1970 census, into districts for the election of members of the Senate and House of Delegates. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1343 (3) and 2201, and 42 U.S.C. §§ 1983 and 1988. Three-judge courts were convened to hear each of the suits, as required by 28 U.S.C. §§ 2281 and 2284.

The cases were consolidated for trial on June 16, 1971, and an opinion for the consolidated court was filed and an interlocutory order entered on July 2, 1971, declaring the Virginia reapportionment plan unconstitutional and substituting a court-prepared plan. The City of Virginia Beach sought a stay of this order and a new trial from Judge John A. McKenzie, which were denied on July 13. (J. App. 26-27). Virginia Beach filed a Notice of Appeal in all three suits in the United States District Court for the Eastern District of Virginia on July 15. (J. App. 47-48). An application for a stay was denied by Mr. Justice Black on July 27, 1971. 404 U.S. 1201. Virginia Beach filed its jurisdictional statement on September 13, 1971, and probable jurisdiction was noted on April 17, 1972. The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The Virginia reapportionment plan overturned by the District Court is contained in Chapter 116, Acts of Assembly of 1971 (J. App. 27-30), setting forth a reapportionment plan for the House of Delegates, and Chapter 120, as

amended and re-enacted by Chapter 246, Acts of Assembly of 1971 (J. App. 31-43), setting forth a reapportionment plan for the Senate. Chapter 116 has been codified as *Va. Code Ann.* § 24.1-12.1 (Cum. Supp. 1971). Chapter 246 has not been codified, but Chapter 120 appears as *Va. Code Ann.* § 24.1-14.1 (Cum. Supp. 1971).

QUESTIONS PRESENTED

(1) Whether the standards for testing the constitutionality of congressional redistricting under Article I, § 2 as determined by this Court in *Wesberry* v. *Sanders, Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller* should displace the standards set in *Reynolds* v. *Sims* for testing the constitutionality of state reapportionment under the Equal Protection Clause.

(2) Whether the slight deviation from mathematical equality in the General Assembly's reapportionment plan for the House of Delegates is justified to maintain the integrity of political subdivision boundaries in order to give the voters of political subdivisions a voice in at least one house of Virginia's legislature.

(3) Whether the District Court's reapportionment plan, which denies to certain political subdivisions representation in proportion to their population, submerges large numbers of Virginia Beach citizens in vast multimember districts for the election of members of both houses, and contains significant deviations from population equality among districts, is constitutional.

(4) Whether the District Court abused its power and discretion by ordering a reapportionment plan without giving the General Assembly any opportunity to revise its plan and without giving anyone an opportunity to be heard.

STATEMENT OF THE CASE

Pursuant to Article II, § 6 of the Constitution of Virgini of 1971, the General Assembly enacted Chapters 116 an 120, Acts of Assembly of 1971, on March 1, 1971, appo tioning the State into 52 districts for the election of th 100 members of the House of Delegates and 40 singl member districts for the election of members of the Senat

Three suits were thereafter instituted in the Unite States District Court for the Eastern District of Virgini attacking the constitutionality of these Acts. Two suit *DuVal* v. *Prichard*, filed in the Richmond Division (Civ Action No. 174-71-R) (App. 47-64), and *Parris* v. *Prichar* filed in the Alexandria Division (Civil Action No. 111-7 A) (App. 14-27), alleged that Northern Virginia wa underrepresented in the House of Delegates. The third sui *Howell* v. *Mahan*, filed in the Norfolk Division (Civil Ac tion No. 105-71-N) (App. 93-110) alleged that 36,69 naval personnel stationed at the Norfolk Naval Station, bu largely residing elsewhere, had improperly been placed i one senatorial district. The three suits were consolidate for trial and set for hearing on May 24, 1971, before fou judges, sitting as three Three-Judge District Courts.

Virginia Beach, a city with a 1970 population of 172,10 located adjacent to the City of Norfolk, intervened as party defendant in all three suits pursuant to Rule 24(a of the Federal Rules of Civil Procedure. Other intervenor included the City of Norfolk as a defendant and severa black citizens of the City of Richmond (William S. Thorn ton, et al.) who intervened as plaintiffs on behalf of them selves and all those similarly situated black residents o Virginia.

On May 7, 1971, the United States Attorney General acting pursuant to Section 5 of the Voting Rights Act o

1965, 42 U.S.C. § 1973(c), objected to the multimember House districts in five urban areas on the grounds of dilution of the black minority vote and objected to the line demarcating the boundary between the 5th and 6th Senatorial Districts in Norfolk on the ground that this contorted line may adversely affect the voting strength of blacks. (J. App. 51-53).

The hearing on May 24 was devoted to arguing the effect of the Attorney General's objection. The court thereupon entered an "Order on First Hearing" (J. App. 43-46) providing: (1) that the trial of the three suits be continued to allow Virginia an opportunity to obtain approval of a reapportionment plan from the United States Attorney General or the United States District Court for the District of Columbia, as provided in the Voting Rights Act, (2) that the primary elections originally set for June 8, 1971, be postponed until September 14, 1971, and (3) that the court would proceed with trial of the three suits and thereafter itself formulate a reapportionment plan resolving valid objections, if any, of the plaintiffs, unless prior to June 15, 1971, Virginia had submitted a reapportionment plan to the United States Attorney General for his approval or had sought a declaratory judgment from the United States District Court for the District of Columbia.

Before the June 15 deadline, this Court handed down its opinion in *Whitcomb* v. *Chavis,* 403 U.S. 124 (June 7, 1971). Thereupon, the Attorney General withdrew his objection to the reapportioment plan for the House of Delegates. (J. App. 53). On June 14, 1971, the General Assembly adopted Chapter 246, Acts of Assembly of 1971, which amended Chapter 120 to revise the line between the 5th and 6th Senatorial Districts, thereby eliminating the Attorney General's sole objection to the reapportionment plan for the Senate. (J. App. 54-55).

The three suits were heard by the consolidated District Court on June 16, 1971. The General Assembly was in session at the time, having postponed final adjournment for the sole purpose of remedying any aspects of its plan which might be invalidated by the District Court.[2] But without giving the General Assembly an opportunity to devise a plan acceptable to the court or requesting the parties to submit suggested plans, the court on July 2, 1971, filed an opinion (J. App. 1-22) and entered an interlocutory order (J. App. 23-25) reapportioning Virginia. As affecting Virginia Beach, the General Assembly's reapportionment plan and the modifications made by the District Court are as follows:

House of Delegates

(a) Under the General Assembly's reapportionment plan for the House of Delegates, Virginia Beach constituted the 40th House District and was allocated three delegates for its population of 172,106, or one delegate per 57,369 citizens. Since one House delegate should ideally represent only 46,485 citizens, the General Assembly created a floater district (the 42nd) comprising the cities of Virginia Beach, Portsmouth (population 110,963) in the 41st District and Chesapeake (population 89,580) in the 38th District.

(b) The District Court eliminated the 42nd House District, transferring its delegate to Northern Virginia. It then resolved the resulting underrepresentation of Virginia Beach by combining a portion of Virginia Beach with Norfolk. But instead of transferring to the 40th House District the 13,834 Norfolk citizens necessary to give Virginia Beach four delegates, the District Court transferred more than twice as many people—29,136—from Virginia Beach to Norfolk's 39th District to justify Norfolk's seven

[2] The General Assembly did not finally adjourn until July 8, 1971.

delegates. Further, under the court's plan these Virginia Beach citizens do not vote in a single-member district with Norfolk residents; rather they vote in a multimember district with the entire 307,951 population of Norfolk.

Senate

(a) Under the General Assembly's reapportionment plan for the Senate, Virginia Beach was allotted one senator for 116,528 of its citizens (the 8th Senatorial District). Of the remaining Virginia Beach citizens, 40,195 vote for one senator with 75,764 citizens of Norfolk, a total of 115,959 (the 7th Senatorial District), and 15,383 vote for one senator with 7,111 citizens of Nansemond County and the 89,580 citizens of the City of Chesapeake, a total of 112,074 (the 14th Senatorial District). The City of Norfolk was divided into three single-member senatorial districts: the 5th (population 116,084), the 6th (population 116,103) and the 7th (population 115,959, comprising 75,764 citizens of Norfolk and 40,195 citizens of Virginia Beach).

(b) The District Court did not alter any senatorial district boundaries. It did, however, consolidate the 5th, 6th and 7th Senatorial Districts into one multimember district in which three senators are to be elected at large. This consolidation was to compensate for the exaggerated population of the 5th District caused by counting 36,693 naval personnel at the homeport of their assigned vessels—the Norfolk Naval Station—which is located entirely within the 5th Senatorial District. At least 18,000 of those stationed at the Naval Station allegedly live outside of the 5th Senatorial District. (App. 100). Consolidation of the 5th, 6th and 7th Districts was to spread the disruptive effect of the naval personnel in the 5th District throughout the three

districts. Further, as a result of the consolidation the 40,195 citizens of Virginia Beach who would have voted for one senator with 75,764 citizens of Norfolk under the General Assembly's plan now vote for three senators with 307,951 citizens of Norfolk.

SUMMARY OF ARGUMENT

In judging the constitutionality of Virginia's plan strictly on mathematical grounds and totally ignoring the distinction between congressional redistricting and state reapportionment, the District Court clearly erred. Virginia's plan does not submerge population as the controlling criterion and the slight deviation[3] in its plan for the House of Delegates is fully justified by the State's traditional policy of respecting political subdivision boundaries in order to give a voice to political subdivisions. This policy is a recognized justification for some deviation in state reapportionment; the contrary authority relied upon by the District Court is, for valid reasons, applicable only to congressional redistricting. Moreover, in preparing its own plan the District Court violated significant judicial standards. The court's plan contains too much deviation to satisfy the standards relating to congressional redistricting, and it irrationally and invidiously discriminates against certain political subdivisions, notably Virginia Beach, in violation of the Equal Protection Clause. Further, in unnecessarily preempting the General Assembly's right to prepare a constitutionally acceptable plan and in giving no one an opportunity to ques-

[3] "Deviation" will be used to signify percentage deviation from the population norm per delegate (the norm for the Virginia House of Delegates is 46,485 and the Senate norm is 116,212). "Variation" is the total of the maximum deviation above (underrepresentation) and below (overrepresentation) the norm.

tion the validity of its plan, the District Court abused its equitable powers and violated the most fundamental principle of due process.

ARGUMENT

I.

There Is A Significant Distinction Between State And Congressional Reapportionment.

A.

The District Court Used The Wrong Test In Reviewing The General Assembly's Plan.

While state and congressional reapportionment present the same fundamental principle—equal representation for equal numbers of people—they present quite different constitutional considerations and problems. The District Court ignored this distinction. In striking down the General Assembly's plan the court cited two congressional cases, *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969), and the leading state case, *Reynolds* v. *Sims,* 377 U.S. 533 (1964), as if they required the same result.[4]

The District Court erroneously relied on the unequivocal mathematical standard set down in *Kirkpatrick*—"a good-faith effort to achieve absolute equality." 330 F. Supp. at 1147-48. There was no analysis of the General Assembly's House plan—only an observation that one district was over-

[4] Although the District Court's opinion was not handed down until July 2, 1971, and relied heavily upon *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971), decided June 7, 1971, for its holding regarding multimember districts, the District Court did not even mention *Abate* v. *Mundt,* 403 U.S. 182 (1971), also decided on June 7, 1971, which was this Court's most recent application of the Equal Protection Clause to reapportionment.

represented by 6.8% while another was underrepresented by 9.6%. "This variation," said the court, "is sufficient to condemn the plan." 330 F. Supp. at 1140.

B.

THE STANDARDS APPLICABLE TO STATE REAPPORTIONMENT ARE SET FORTH IN REYNOLDS v. SIMS.

In *Wesberry* v. *Sanders,* 376 U.S. 1 (1964), the Court held that, construed in its historical context, Article 1, § 2 of the Constitution requires that representatives be chosen from congressional districts that are equal in population "as nearly as is practicable." 376 U.S. at 7-8. Four months later, when state reapportionment was first decided on the merits in *Reynolds,* the Court held that equality of representation was also required under the Equal Protection Clause of the Fourteenth Amendment.[5] Although *Wesberry* was not "wholly inapposite", it was not dispositive of the *Reynolds* decision since it was "based on different constitutional considerations and [was] addressed to rather distinct problems." 377 U.S. at 560. Population remained the overriding objective, but the Court realized there were many considerations involved in state reapportionment cases that were not involved in congressional redistricting. The problem was to ascertain "whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures." 377 U.S. at 561.

The Court found two "legitimate considerations incident to the effectuation of a rational state policy" that justify

[5] The stated purpose of the Court's opinion in *Reynolds* was to determine the basic standards and state the applicable guidelines for implementing the decision in *Baker* v. *Carr,* 369 U.S. 186 (1962). *Baker* established the justiciability of questions of state reapportionment; the justiciability of questions of congressional redistricting had long before been settled—in 1932. See *Baker,* 369 U.S. at 232.

departure from equality in addition to the one consideration noted in *Wesberry*. 377 U.S. at 579. In *Wesberry*, the Court had recognized the practical impossibility of arranging congressional districts so that all would be mathematically equal. 376 U.S. at 18. The Court in *Reynolds* saw the applicability of this consideration to state reapportionment. Refusing to elaborate, the Court stated only that practical impossibility would be judged on a case-by-case basis against the standard of "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." 377 U.S. at 577.

Of the two new considerations cognizable only in state reapportionment, one is a state's right to utilize, insofar as possible, political subdivision boundaries in drawing legislative districts and to provide for compact districts of contiguous areas in an effort to avoid partisan gerrymandering. 377 U.S. at 578-79. The second is "that of insuring some voice to political subdivisions, as political subdivisions." 377 U.S. at 580.

Since *Reynolds*, there have been only two full-dress opinions of this Court dealing with matters of state reapportionment (other than the validity of multimember districts), *Swann* v. *Adams*, 385 U.S. 440 (1967), and *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967). Neither added to nor subtracted from the standards established in *Reynolds*. Florida made no attempt to justify the deviations in its plan struck down in *Swann*. The justification for the deviation in the Texas plan held unconstitutional in *Kilgarlin* was no more than an afterthought and more imaginary than real. Judged solely on the standard of practical impossibility, both plans were clearly unconstitutional. These cases give no guidance how states should reapportion their legisla-

tures; they only provide a lesson in how *not* to reapportion. Both cases are entirely consistent with *Reynolds*.

Recently, in *Abate* v. *Mundt*, 403 U.S. 182 (1971), this Court approved a plan for local reapportionment where deviations from mathematical equality were justified by legitimate policy. Like state reapportionment, local reapportionment is tested under the Equal Protection Clause and the standards laid down in *Reynolds*. In order to give a voice on its governing body to each town, Rockland County, New York (population 218,804), had devised an apportionment plan whereby the smallest of five towns was given one representative and the others from two to six representatives on a proportionate basis. The mathematics of this plan worked well; the total variation in population per representative between the most underrepresented and the most overrepresented town was only 11.9%. This Court found that this slight departure from mathematical equality was justified on the authority of *Reynolds*.

Nevertheless, it has never been necessary for this Court to apply the policy considerations of *Reynolds* in a case of state reapportionment. In each state case (until the instant one) the deviations have been unjustified and so pronounced that they could not have been the product of a good faith effort to achieve equality as nearly as is practicable. Thus, this Court has never confronted the question raised by *Reynolds:* At what point does deviation necessitated by giving a legislative voice to political subdivisions become so large that it submerges population as the controlling criterion?

The District Court below apparently believed the answer to this question lies in eliminating the question altogether on the authority of *Kirkpatrick* and *Wells*. However, the court overlooked the distinction continuously made by this Court between congressional redistricting and state re-

apportionment, a distinction that has been blurred by the extreme deviations in the state plans reviewed by this Court. When faced in *Abate* with a plan devoid of such extremes, this Court reaffirmed *Reynolds* in the context of local reapportionment. The issue of local reapportionment in *Abate* is analogous to state reapportionment, but not to congressional redistricting. The instant case presents this Court with the opportunity to reaffirm *Reynolds* in the context of state reapportionment and to place *Kirkpatrick* and *Wells* in their proper perspective. Unless *Reynolds* is overruled, it remains the test of constitutionality in state reapportionment.

C.

NO POLICY CONSIDERATIONS JUSTIFY DEPARTURE FROM MATHEMATICAL EQUALITY IN CONGRESSIONAL REDISTRICTING.

Kirkpatrick and *Wells* demonstrate how different the result can be in applying *Wesberry* rather than *Reynolds*. In *Kirkpatrick*, Missouri's congressional redistricting plan with districts deviating from 2.84% below the norm to 3.13% above was declared unconstitutional. The New York congressional redistricting plan held unconstitutional in *Wells* contained deviations of plus 6.5% to minus 6.6%. The total variation in the apportionment plan approved in *Abate* (11.9%) was substantially greater than that disapproved in *Kirkpatrick* (5.97%) and only slightly less than that disapproved in *Wells* (13.1%). But contrary to the decision in *Abate*, this Court said in *Kirkpatrick:*

> "Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." 394 U.S. at 533-34.

Kirkpatrick and *Wells* are significant in two respects. They reject *for congressional redistricting* the two policy considerations announced in *Reynolds* that justify deviation from precise mathematical equality. The decisions also narrow the scope of the third consideration—that some departure from exact equality may be permitted due to the practical impossibility of achieving perfect equality. The Court said that "it is simply inconceivable" that congressional district lines could not be drawn to avoid a 5.97% variation between the most and least populated districts in Missouri. 394 U.S. at 532. It is now clear that in congressional redistricting (and perhaps in reapportionment of a state which does not have a policy of respecting political subdivision lines) the only constitutionally permissible deviations are those that result in spite of "a good-faith effort to achieve precise mathematical equality." 394 U.S. at 530-31. While *Kirkpatrick* and *Wells* clarify the standard set in *Wesberry,* they do not change it; population alone has always been the sole criterion of constitutionality in congressional redistricting.

D.

UNDER THE AMERICAN THEORY OF REPRESENTATIVE GOVERNMENT THERE IS NO NEXUS BETWEEN CONGRESSIONAL DISTRICTS AND STATE POLITICAL SUBDIVISIONS.

In *Kirkpatrick,* this Court understandably rejected Missouri's argument that deviation in congressional redistricting may be justified by a state's policy of avoiding fragmentation of political subdivisions. Representatives in Congress play no part in the state legislative process. Instead of representing political subdivisions, they serve to provide each voter with a voice in the making of national policy. Consequently, population is the only factor that has any

importance in arranging for each individual's voice to be heard through his representative. This point was recognized in the Virginia plan of representation presented to the Constitutional Convention in 1787 which called for representation in both houses of Congress based on population. Considerable controversy arose over this proposal because the smaller states feared domination by the larger. A compromise was later reached whereby the House of Representatives would represent the people on the basis of equality of population while the Senate would represent the varying interests of the States on the basis of equality among them. From its conception, then, the House of Representatives was national in scope.

As this Court noted in *Wesberry,* for the first 50 years of our nation's history at-large elections for the House of Representatives was a common practice. 376 U.S. at 8. Districting was originally made uniform by statute in 1842 in order to provide citizens with a specific representative in Congress and to facilitate communication between each representative and his constituency. See Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle"?,* 17 Law & Contemp. Prob. 276 (1952). Districting was not designed to provide for varying local interests. In *Reynolds,* this Court held the federal analogy inapposite to Alabama's attempted justification for submerging population as a basis for apportioning one house of its legislature. 377 U.S. at 575. Likewise, the federal analogy is inapposite to determining whether a state has made a "good faith effort" to make districts "as nearly of equal population as is practicable." In short, although "practical impossibility" is the only justification for departure from absolute equality in congressional redistricting, this should in no way vitiate valid policy considerations justifying such departures in state reapportionment.

Moreover, merely as a practical matter, it is considerably easier to achieve population equality among congressional districts than among state legislative districts. The Minnesota District Court, as noted in *Sixty-Seventh Minnesota State Senate* v. *Beens,* 40 U.S.L.W. 3525, 3526 (U.S. Apr. 29, 1972), found that the larger the population of a district, the easier it is to achieve equality. And in terms of percentages, the smaller the population of a district, the more pronounced become the deviations from perfect equality.

E.

THE STATE POLICY CONSIDERATIONS RECOGNIZED IN REYNOLDS SHOULD PLAY AN IMPORTANT PART IN STATE REAPPORTIONMENT.

In *Reynolds,* the Court recognized that in the area of state reapportionment there are matters of policy which a state itself may determine. In *Beens,* the Court reaffirmed this, holding that the number of members in a state legislature is solely a matter of state policy. "Size is for the State to determine in the exercise of its wisdom and in the light of its awareness of the needs and desires of its people." 40 U.S.L.W. at 3527. And in *Grivetti* v. *Illinois State Electoral Board,* 335 F. Supp. 779 (N.D. Ill. 1971), *aff'd mem.,* 40 U.S.L.W. 3537 (U.S. May 15, 1972), the District Court approved Illinois' policy of completely ignoring county and municipal boundaries in reapportioning the State.

Nevertheless, when a state has adopted a policy of giving some voice to political subdivisions and has traditionally and consistently maintained this policy, implementation of the policy should be permitted so long as population remains the overriding consideration. There are strong reasons to support such a conclusion. State legislators play a significant role in local political processes. Virginia, and many other states, delegate essential governmental functions to

political subdivisions. And the powers they exercise are established, modified and removed by the states' legislatures. Thus, these states have a legitimate interest in providing a representative voice in their legislatures for political subdivisions. How else can the legislature be advised of what the people want in terms of local government? A legislature elected without regard for the representation of political subdivisions can, of course, pass upon matters of local government. But are its actions likely to be responsive to the will of the people directly affected? In Virginia, a policy in this regard was established in 1776 in its Declaration of Rights now embodied in Article I, § 6 of the Virginia Constitution:

> "That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, *the community,* have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, *or bound by any law to which they have not, in like manner, assented for the public good.*" (emphasis added).

The conclusion that political boundaries are relevant factors in reapportioning a state so as to give political subdivisions a voice is the very essence of *Reynolds.* If *Reynolds* and its companion cases mean no more than *Wesberry,* one might ask why they comprise 233 pages of the Supreme Court Reports. As Chief Justice Warren said in *Reynolds:*

> "In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular subdivisions. And a State may legitimately desire to construct dis-

tricts along political subdivision lines to deter the possibilities of gerrymandering." 377 U.S. at 580-81.

II.

Tested Under The Proper Standard, The General Assembly's Plan Is Constitutional.

A.

Virginia's Policy Was To Use Population As The Primary Criterion And To Give Political Subdivisions A Voice In One House.

The General Assembly followed Article II, § 6 of the Virginia Constitution in preparing its reapportionment plan:

> "Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district."

In reapportioning the Senate, the General Assembly eschewed its traditional practice of maintaining the integrity of political boundaries and followed a policy of single member districts. It used city and county boundaries only as a frame of reference and did not hesitate to cross these boundaries in the pursuit of population equality. Virginia Beach provides an excellent example. One senatorial district is located completely within its boundaries, a second is made up of parts of Virginia Beach and Nansemond County and all of the City of Chesapeake, and a third is made up of parts of Virginia Beach and Norfolk. The District Court found no mathematical infirmity in this plan.

In reapportioning the House of Delegates, however, the General Assembly followed the State's long-standing tradition of respecting political subdivision lines in order to

give cities and counties some voice in the legislature. This tradition was recognized in *Davis* v. *Mann*, 377 U.S. 678, 686 (1964):

> "Because cities and counties have consistently not been split or divided for purpose of legislative representation, multimember districts have been utilized for cities and counties whose populations entitle them to more than a single representative, resulting in there always being less than 100 delegate districts and less than 40 senatorial districts. And because of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed only of combinations of counties and cities and not by pieces of them."

Even respecting political subdivision boundary lines, the General Assembly came extremely close to the mathematical ideal by utilizing floater districts in some instances and multimember districts in others. The District Court looked only at the total variation of 16.4%. 330 F. Supp. at 1139. But 35 House districts were within 4% of the ideal of 46,485 persons per delegate, and only two exceeded this norm by more than 8%. The average deviation from the norm was only 3.9%. The ratio between the largest and smallest House districts was 1.18-to-1. Theoretically, 49.3% of the population of Virginia could elect a majority of 51 delegates in the House. (App. 77). This figure is within 1.7% of perfection.

The District Court seemingly acknowledged that the General Assembly's plan came as close to mathematical equality as possible while preserving the integrity of political subdivision lines. 330 F. Supp. at 1140. And most significantly, no one has brought forward a plan demonstrating that a higher degree of equality could be attained while preserving political subdivision lines.

B.

VIRGINIA'S PLAN IS IN MARKED CONTRAST WITH THOSE INVALIDATED IN OTHER CASES.

This Court has never invalidated a state reapportionment plan with such a tight adherence to population equality. All of the plans under review in 1964 were characterized by extreme inequality and irrational discrimination against certain voters. Nor did *Swann* and *Kilgarlin* shed any light on the degree of population equality required by the Equal Protection Clause. There the Court held only that variations of 25.65%, 33.55%, and 26.48% were not unavoidable. Since there was no attempt in *Swann* and only a spurious one in *Kilgarlin* to justify the variations on the basis of the policy considerations recognized in *Reynolds*, the plans were found unconstitutional.

Unlike the instant case, an alternative plan was presented in *Kilgarlin* to show that greater equality could have been achieved even while maintaining the integrity of political subdivision lines. But in neither *Swann* nor *Kilgarlin* did this Court come to grips with whether such large variations could be justified. Consequently, these cases do not begin to decide whether a plan with a variation as low as 16.4%, much less one that is fully justifiable, provides for equality "as nearly as is practicable."

C.

VIRGINIA'S PLAN SHOULD BE JUDGED ON ITS MERITS, NOT ITS MATHEMATICS.

Virginia's House plan is not unconstitutional simply because one district is overrepresented by 6.8% while another is underrepresented by 9.6%. The District Court's holding to the contrary is not supported by any decision of this Court. The Court has never disapproved a state plan with

a total variation figure even approaching the 16.4% figure in Virginia's plan. And the cases all hold in no uncertain terms that a reapportionment plan cannot be judged on the basis of pure mathematics. In *Reynolds* this Court stated that permissible deviation in one state may be unsatisfactory in another "depending on the particular circumstances of the case." 377 U.S. at 578. And in *Swann* it is made even clearer that the mathematics of one plan has little bearing on another:

> "In any event, the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State." 385 U.S. at 445.

The error in applying pure mathematics to state reapportionment can be seen through a comparison with congressional redistricting. The number of constituents of a representative in Congress does not vary substantially from state to state and congressional districts are of the same approximate size throughout the United States. Since population is the sole criterion of equality in congressional redistricting, and there are no constitutionally cognizable policy considerations which a particular state may use to justify deviations from equality, a certain deviation held impermissible in one state has considerable relevance to what is impermissible in another.

This is not true in state reapportionment. The number of seats in a state legislature varies from state to state. A state with a relatively large legislature would probably have a large number of districts and mathematical equality would therefore be more difficult. See *Sixty-Seventh Minnesota State Senate* v. *Beens,* 40 U.S.L.W. 3525, 3526 (U.S. Apr. 29, 1972). For example, New Hampshire only has to draw one line dividing the state into two equal parts for congres-

sional redistricting. But it has to draw lines to accommodate 400 representatives for purposes of state reapportionment. Moreover, in state reapportionment the policy considerations recognized in *Reynolds* may justify deviation in certain states while not in others. Consequently, a state reapportionment plan must be judged in light of state policy and cannot be tested for compliance with the Equal Protection Clause merely by comparing its percentage deviation figures with those of another plan disapproved by this Court.

D.

RATIONAL STATE POLICY CONSIDERATIONS FULLY JUSTIFY THE DEVIATION.

In its singular concern for arithmetic perfection, the District Court ignored factors which justify the slight deviation in Virginia's House plan. While traditionally regarding population as the most important factor in reapportionment, Virginia has historically maintained the integrity of political subdivision lines in both houses of its legislature. *Davis* v. *Mann, supra* at 19. Moreover, Virginia is not a state which has a history of recalcitrance in matters of reapportionment. The General Assembly reapportioned itself in 1932, 1942, 1952, and 1962 and again in 1964 after its 1962 plan was declared unconstitutional.

Virginia's House plan was not prepared by a woefully malapportioned legislature, but by one elected under a judicially approved plan. *Mann* v. *Davis,* 245 F. Supp. 241 (E.D. Va.), *aff'd mem. sub. nom. Burnett* v. *Davis,* 382 U.S. 42 (1965). The plan was prepared by a representative legislature, not one controlled by rural interests or one that favored one area of the State over another.

The General Assembly's plan is also rational. It contains none of the "crazy quilts" that characterized its 1962 plan. See *Davis* v. *Mann,* 377 U.S. 678, 691 (1964). There is no

unexplainable discrimination against certain areas of the State. Multimember and floater districts were used in a logical manner to avoid crossing political subdivision lines, not intentionally to dilute the voting power of any minority interest groups. The District Court itself recognized that the circumstances of the case "permit the utilization of multi-member districts." 330 F. Supp. at 1146.

Notwithstanding the District Court's conclusory finding that "[t]he state has proved no governmental necessity for strictly adhering to political subdivision lines" (330 F. Supp. at 1140), the reason is perfectly clear. It was recognized in *Reynolds* "that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature." 377 U.S. at 580. This consideration is directly relevant to the government of Virginia. Schools, tax assessment and collection, police and fire protection, water and sewer services and recreational facilities are examples of governmental services provided by cities and counties in Virginia. Political subdivisions in Virginia also have legislative powers in such matters as zoning and civil and criminal ordinances of local application. Virginia is unique in that cities are autonomous political entities functioning entirely apart from counties. The powers exercised by a city or county in Virginia are established, modified or removed by the General Assembly. See *Va. Const.* art. 4, §§ 2 and 3. Yet these factors were completely ignored by the District Court.

The District Court attempted to justify its finding of "no governmental necessity" on the ground that the plan did not consistently maintain the integrity of political subdivision lines. The one instance noted was that of Fairfax County, by far the largest political subdivision in the State (population 455,021), which was divided into two multimember districts. But there is no inconsistency here. The

boundary of Fairfax County was not crossed. Instead of the entire county voting for ten delegates, the General Assembly divided it into two districts (18th and 19th) with five delegates apiece. This was reasonable if only to permit better voter identification with candidates.

Virginia's House plan, in the particular governmental context of Virginia, is constitutional under the standards laid down in *Reynolds*. The State's policy of preserving the integrity of political subdivisions so as to give them a voice does not unconstitutionally infringe upon the equality principle of the Equal Protection Clause. And it provides for making local government more responsive to the people while preventing the political gerrymandering of almost ludicrous proportions that has taken place in some states in the name of "equal representation for equal population."[6] Certainly the State's policy was worth the 6.1% difference in total variation between the General Assembly's plan and that prepared by the District Court.[7]

III.

The District Court's Plan Is Unconstitutional Under State Or Congressional Standards.

A.

The District Court Upset The Carefully Drawn Balance Of Representation In Virginia's Plan.

The House plan prepared by the District Court as a substitute for the General Assembly's plan is a hastily prepared patchwork measure. District lines in the General Assembly's

[6] O'Rourke, *Reapportionment: Law, Politics, Computers* 68-69 (American Enterprise Institute for Public Policy Research, Domestic Affairs Study 1, February, 1972).

[7] Total variation was 16.4% under the General Assembly's plan and 10.3% under the District Court's plan.

plan were simply shifted here and there in an attempt to achieve the absolute mathematical equality required by *Kirkpatrick*. At the same time the court attempted to preserve "the clear preference of the Assembly to adopt recognized political subdivision lines in apportioning delegates." 330 F. Supp. at 1140. The District Court achieved neither of these objectives.

The court failed to realize that Virginia's House plan was a carefully drawn balance of the various interests of the State's political subdivisions. Cities and counties were given representation in substantial proportion to their population. This was not easily accomplished. The General Assembly could not give each city or county a separate voice since this would clearly subvert the equal population principle. *Reynolds*, 377 U.S. at 581. And in only a few instances did the population of a political subdivision correspond with the ideal number necessary to support a particular number of delegates. Consequently, the General Assembly had to use a complex combination of single, multimember and floater districts to achieve a synthesis of equality of representation among political subdivisions and the overriding consideration—population equality.

By merely tampering with the General Assembly's plan for the sole purpose of achieving greater population equality, the District Court destroyed the representational balance struck by the General Assembly. The court extended single and multimember districts across political subdivision lines in some twelve instances. In every instance, the political subdivision which lost *population* did not receive any *represensentation* in return. A prime example is Scott County. Under the General Assembly's plan this county of 24,376 people voted in the 1st District for 2 delegates with the 76,346 population of Dickinson, Lee and Wise Counties. Because the 1st District was underrepresented, the District Court

transferred 6,063 people from Scott County to the 2nd District to vote for 2 delegates with 87,041 people from the City of Bristol and Smyth and Washington Counties. As a result, Scott County has a substantially smaller voice in the 1st District and virtually no voice in the 2nd District.

The plight of Scott County is shared by the Counties of Wythe, Albemarle, Charlotte, Prince William, Rockingham, Dinwiddie, Amelia and Essex and the Cities of Chesapeake and Virginia Beach. Each has lost a certain degree of representation and received nothing in return.

The problem exists only because the District Court tried to adhere to the General Assembly's policy of respecting political subdivisions while applying congressional standards. Cities and counties still have a voice in the House of Delegates, but under the court's plan some have a disproportionately smaller voice than others. Since representation under the court's plan is not equal, the plan violates the fundamental principle of equal protection in reapportionment. *Reynolds,* 377 U.S. at 560-61. Under the Equal Protection Clause equality means equality of representation, not equality of numbers. The fact that equality of numbers may be synonymous with equal representation in congressional redistricting is irrelevant.

B.

THE DISTRICT COURT'S DISCRIMINATION AGAINST VIRGINIA BEACH IS INVIDIOUS AND IRRATIONAL.

The District Court's plan discriminates against several cities and counties, but none more drastically than Virginia Beach. Under the General Assembly's plan, Virginia Beach constituted the 40th House District and was allocated three delegates for its 1970 population of 172,106. Since one dele-

gate should ideally represent 46,485 citizens, the General Assembly cured the resulting underrepresentation of 32,651 by providing a floater delegate for the 42nd District composed of the cities of Virginia Beach, Portsmouth and Chesapeake. The resulting deviation for Virginia Beach was plus 0.2%.[8]

The District Court left Virginia Beach with the 40th District and its three delegates, abolished the 42nd District and transferred its floater delegate to Northern Virginia. It then disposed of 3,515 of the remaining 32,651 by adding them to the ideal population (3 x 46,485, or 139,455) of the 40th District. This resulted in the 40th District being underrepresented by 2.5%. 330 F. Supp. at 1144. The remaining 29,136 were transferred to the City of Norfolk to vote in the multimember 39th House District with the entire Norfolk population of 307,951.

Political realities insure that the seven at-large delegates who are elected from Norfolk's 39th House District will speak in the General Assembly for the 91.4% of their constituents who reside in Norfolk while the 8.6% who reside in Virginia Beach will be ignored. No Virginia Beach citizen was among the seven delegates elected from the 39th House District in 1971 and, as a matter of practical politics, none ever will be. In terms of their representation in the General Assembly in matters of local government, these 29,136 residents of Virginia Beach have been effectively disenfranchized. Their schools, police and fire protection, water and sewer services and the multitude of other governmental

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[8] Under one method of calculating deviation in floater districts, Virginia Beach was underrepresented by 7.3% under the General Assembly's plan. *Howell* v. *Mahan*, 330 F.Supp. at 1144 n. 4. However the calculation is done, there is no question that Virginia Beach has less *representation* under the District Court's plan than under the General Assembly's plan.

services provided by their local government do not come from Norfolk. They are not taxed by Norfolk. Yet the delegates for whom they are entitled to vote speak for Norfolk alone in all these matters.

Not only has the District Court denied representation to these 29,136, it has discriminated against all citizens of Virginia Beach. These citizens have a common interest in their local government and its particular problems which they do not share with other voters of the State. Virginia Beach has a tremendous land area (312 square miles) and contains a heterogeneous mix of urban, suburban and rural areas. See *Dusch* v. *Davis,* 387 U.S. 112 (1967). Its unique and diverse problems can be solved only with the assistance and intervention of the State.

In the many matters relating to local government, the political subdivisions are the constituencies of the Virginia House of Delegates. The laws relating to local government introduced and enacted in the House of Delegates govern them directly. Since the interests of Virginia Beach are not the same as the Cities of Norfolk or Roanoke or Fairfax County, the legislature must resolve the many conflicts between political subdivisions that arise over legislative proposals. In terms of political influence in the House, the population of Virginia Beach is 139,455. Yet its actual population is 172,106. In terms of *representation* Virginia Beach is underrepresented by 23.4% since the three delegates elected from Virginia Beach's 40th District are the only ones who represent the common and unique interests of its 172,106 citizens.

Even assuming that the District Court was correct in focusing entirely on numbers to the point of totally ignoring representation, the manner in which it resolved the numbers problem in Virginia Beach is a classic example of an irrational "crazy quilt." The District Court transferred

29,136 Virginia Beach citizens to Norfolk's seven member 39th District to resolve the overpopulation in Virginia Beach. Substantially the same degree of deviation would have resulted had the District Court transferred one delegate and 10,000 fewer citizens from Norfolk's 39th District to Virginia Beach's 40th District.[9] The action of the District Court in transferring 10,000 more citizens than necessary is illogical and totally indefensible.

The irrationality of the District Court's action might be dismissed as blind inadvertence were it not for two other considerations. The first is the court's misuse of population figures. It transferred one delegate to Fairfax County from the Tidewater area because three districts in Tidewater were slightly (4.8%) overrepresented while three districts in Northern Virginia were slightly (5.4%) underrepresented. 330 F. Supp. at 1145-46. The court pointed to the remarkable past and projected population growth of Northern Virginia as compared to that of Norfolk as justification for this transfer. 330 F. Supp. at 1146. But it was Virginia Beach, not Norfolk, that paid the price for this transfer. Norfolk has the same number of delegates under both plans while Virginia Beach lost a floater delegate which would have been responsive to its interests. Yet Virginia Beach was not overrepresented under the General Assembly's plan.[10] And more significantly, Virginia Beach has been, and is projected to continue to be, the second fastest grow-

[9] Under the District Court's plan Virginia Beach's 40th House District is underrepresented by 2.5% while Norfolk's 39th District is underrepresented by 3.6%. The transfer of one delegate and 19,000 citizens from the 39th District to the 40th would increase the underrepresentation in Virginia Beach slightly (from 2.5% to 2.8%), but Norfolk's underrepresentation would have remained at 3.6%.

[10] Depending on how deviation is calculated with reference to the floater district, Virginia Beach was underrepresented by 0.2% or 7.3% under the General Assembly's plan. 330 F.Supp. at 1144 & n. 4.

ing political subdivision in the State.[11] Total population increased from 85,218 in 1960 to 172,106 in 1970, a ten year increase of over 100%. Current projections indicate that by 1980 the population of Virginia Beach will exceed 275,000, yet in 1980 the City will still be represented by three delegates. The failure to consider this dramatic growth trend and the resulting overrepresentation of Norfolk to the extreme detriment of Virginia Beach was clearly erroneous. As this Court stated in *Kirkpatrick*, findings as to population trends must be "applied throughout the State in a systematic, not an *ad hoc* manner." 394 U.S. at 535.

A second factor ignored by the District Court makes the transfer of 29,136 citizens to Norfolk intolerable. Under the court's plan, Norfolk's 5th and 6th Senatorial Districts are consolidated with the 7th Senatorial District, made up of 40,195 Virginia Beach citizens and 75,764 Norfolk citizens, into one large multimember district with a population of 348,146. As a result, the 40,195 citizens of Virginia Beach who would have voted for one senator with 75,764 citizens of Norfolk must vote for three senators with the 307,951 citizens of Norfolk. Before consolidation the 40,195 citizens of Virginia Beach had a voice in the outcome of the election of one senator—now they have *no* voice whatsoever.[12] As in the District Court's House plan, Virginia Beach citizens provide the numbers necessary to give Norfolk added Senate representation but get nothing in return.

Norfolk, which is entitled to proportionate representation of 6.6 delegates and 2.6 senators, is effectively represented by 7 delegates and 3 senators under the District Court's plan while Virginia Beach, which is entitled to proportionate

[11] Deposition of Robert Griffis, at 30 (Norfolk Ex. 1; R. ....)

[12] As was true for the 39th House District, all Senators elected from the consolidated 5th, 6th and 7th Senatorial Districts in 1971 were residents of Norfolk.

representation of 3.7 delegates and 1.5 senators, is represented by only 3 delegates and 1 senator. The cumulative effect of underrepresentation in both houses infringes upon the Fourteenth Amendment rights of Virginia Beach citizens to an equal voice in the General Assembly. This Court has made it perfectly clear that the *overall effect* of representation in both houses must be consistent with the equal representation principle.

> "[I]n reviewing a state legislative apportionment case this Court must of necessity consider the challenged scheme as a whole in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes*, 377 U.S. 656, 673 (1964); *accord, Burns* v. *Richardson*, 384 U.S. 73, 83 (1966).

The discrimination against Virginia Beach results from substantial numbers of its citizens being placed in large multimember districts in both houses of Virginia's bicameral legislature. This Court has recognized the invidious effect of large multimember districts used in both houses:

> "Such a tendency, we have said, is enhanced when the district is large and elects a substantial proportion of the seats in either house of a bicameral legislature, if it is multi-member for both houses of the legislature or if it lacks provision for at-large candidates running from particular geographic subdistricts, as in

Fortson." Whitcomb v. *Chavis,* 403 U.S. 124, 143-44 (1971).[13]

C.

EVEN UNDER ITS OWN STANDARDS, THE DISTRICT COURT'S PLAN IS UNCONSTITUTIONAL.

If the constitutionality of state reapportionment is now to be tested under congressional standards, the District Court's plan is no more constitutional than that prepared by the General Assembly. The court's plan with a total variance of 10.3% contains much more inequality than the congressional plan held unconstitutional in *Kirkpatrick.* Such a variation is clearly not *de minimus:*

> "We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimus* and to satisfy without question the 'as nearly as practicable' standard." *Kirkpatrick,* 394 U.S. at 530.

Nor can a variation as large as 10.3% be justified as "a good faith effort to achieve precise mathematical equality." Simply because a court, rather than a legislature, says that it made such an effort (330 F. Supp. at 1147) does not make it so. The District Court's plan is simply a makeshift modification of the General Assembly's plan. Twenty-six of the 52 House districts were unaltered. More equality could have been achieved simply by ignoring political subdivision lines entirely. Under congressional standards maintenance of political boundary lines is no justification for inequality. *Kirkpatrick, supra* at 13.

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[13] The horrible prospect of attempting to give a voice to all interest groups, recognized in *Whitcomb* (403 U.S. at 156-57), is avoided under the General Assembly's policy of recognizing only one interest group—the political subdivision.

Likewise, the geographical consideration which the District Court used to justify the 6.5% deviation in the 46th District, which consists of the remote Eastern Shore of Virginia, is not recognized under congressional standards. *Kirkpatrick*, 394 U.S. at 536.

Finally, a total variation of 10.3% is simply too much inequality among districts to be justified on the basis of the "as near as practicable" standard. The District Court could have done better—all it needed was the census tracts and an adding machine. Speaking of the Missouri plan with a total variance of 5.97%, this Court said:

> "Finally, it is simply inconceivable that population disparities of the *magnitude* found in the Missouri plan were unavoidable." 394 U.S. at 532 (emphasis added).

IV.

The District Court Abused Its Discretion.

Assuming that the District Court correctly held the General Assembly's plan unconstitutional and that the District Court's plan is constitutional, this Court must nevertheless reverse the interlocutory order of the District Court dated July 2, 1971. The manner in which the District Court exercised its remedial powers exceeded its judicial power and violated all of the fundamental principles of due process.

A.

The District Court Preempted The Legislative Function.

Once a court has held a state's reapportionment plan unconstitutional, the court must take appropriate action to rectify the situation on the basis of "the well-known principles of equity." *Reynolds*, 377 U.S. at 585. Traditionally this has meant referring the defective plan back to the legislature. *See e.g., Scott* v. *Germano*, 381 U.S. 407, 409

burg Board of Education, 402 U.S. 1, 15 (1971). But, as noted in *Whitcomb*, there are limits: "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." 403 U.S. at 161.

In light of the General Assembly's clear ability and willingness to itself provide the necessary remedy, the District Court's refusal to refer the plan back to the General Assembly exceeded the limits of its powers and was a clear abuse of the equitable principles involved. To affirm the District Court's action would destroy any currency remaining in the announced principles of *Reynolds* that "reapportionment is primarily a matter for legislative consideration and determination." 377 U.S. at 586.

B.

THE ACTION OF THE DISTRICT COURT DENIED TO ALL CONCERNED THEIR "DAY IN COURT."

The District Court prepared its reapportionment plan without giving Virginia Beach, or anyone else, an opportunity to be heard on the merits of the plan. The failure to hold any hearing whatsoever is a clear violation of procedural due process. Moreover, it underscores the court's misuse of its equitable powers. It is axiomatic that "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings." *Postal Telegraph Cable Co.* v. *Newport*, 247 U.S. 464, 476 (1918).

The absence of any hearing is especially invidious in the area of reapportionment since a court's plan is not subject to attack. The procedure followed by the District Court has foreclosed Virginia Beach from being heard on the constitutionality, or even the undesirability as a matter of policy, of the plan which, unless reversed here and now, will more than likely govern elections to Virginia's General Assembly for the next decade. The procedures followed be-

low stand in sharp contrast to those followed by the Louisiana District Court in *Taylor* v. *McKeithen*, 40 U.S.L.W. 3584, 3584-85 (U.S. June 12, 1972):

> "The special master held four days of hearings during which over 100 persons were heard. Proposed plans were received by him. No one was denied a hearing. He then submitted his recommendation to the District Court and after a hearing it was adopted by the court."

CONCLUSION

The judgment of the District Court declaring Virginia's reapportionment plan unconstitutional should be reversed and Virginia's plan for the reapportionment of the House of Delegates and Senate reinstated. In the alternative, the plan prepared by the District Court should be declared unconstitutional and the case remanded with directions that the General Assembly be permitted an opportunity to prepare a new reapportionment plan under meaningful standards determined by this Court, or the case should be remanded with directions that the case be reopened and the City of Virginia Beach be permitted an opportunity to be heard on the formation of a new reapportionment plan.

Respectfully submitted,

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Dated: June 30, 1972

CERTIFICATE OF SERVICE

I, Harry Frazier, III, counsel for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief for the Appellant in the United States Mails, first class postage prepaid, this 30th day of June, 1972, addressed to:

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and by depositing one copy of the foregoing Brief for the Appellants in the United States Mails, first class postage prepaid, this 30th day of June, 1972, addressed to The Hon.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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No. 71-364

JOAN S. MAHAN, SECRETARY, STATE BOARD OF ELECTIONS, *et al.*,

Appellants,

v.

HENRY E. HOWELL, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Three-Judge Court)

BRIEF OF APPELLEES THORNTON, *et al.*

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BRIEF OF APPELLEES THORNTON, *et al.*

I.

The Thornton appellees are black voters in the five Virginia cities of Richmond, Norfolk, Portsmouth, Hampton and Newport News. In the district court they alleged and sought to prove that the multi-member districts assigned to those cities in the reapportionment of the House of Delegates operated to minimize or cancel out their voting strength, within the meaning of this Court's decisions in *Burns v. Richardson*, 384 U.S. 73 (1966), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

After, and because of, a number of procedural twists in the district court, the Thornton appellees were unsuccessful in persuading the district court that it should order the use of single-member districts as part of its interlocutory relief. They are, however, proceeding with their claims in the district court, with a view toward an eventual hearing on the merits in which they can establish that the multi-member districts in question are discriminatory. Accordingly, the Thornton appellees urge this Court to limit its consideration of this interlocutory appeal to the questions necessarily raised by the two appeals before the Court, and to avoid deciding questions which are not pressed by any appellants and which are not ripe for review.[1]

---

[1] The Thornton appellees initially took an appeal themselves from the district court's interlocutory order, in which this Court noted probable jurisdiction. Thornton v. Prichard, No. 71-553. That appeal involved questions relating to the validity of the multi-member districts under not only the fourteenth and fifteenth amendments, but also under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The passage of time and changed circumstances, however, have led the Thornton parties to conclude that (1) as to the Voting Rights Act claim, the record is not in such form as would permit the adequate presentation and consideration of the complex questions involved, *see* Rescue Army v. Municipal Court of the City of Los Angeles, 331 U.S. 549 (1947), and (2) as to the *Whitcomb*-type fourteenth and fifteenth amendment claims, appropriate relief must come from the district court's proceeding to the merits rather than from an interlocutory appeal followed by a remand.

Accordingly, a motion to dismiss the appeal in No. 71-553 was made on July 14, 1972. Because the interests of the Thornton parties were and remain adverse to the interests of the Mahan appellants (State officials), this appellees' brief is being filed.

II.

The principal such question not before this Court is the question whether the multi-member districts have a discriminatory effect on black voters' right to cast effective ballots.

From March 1, 1971, when Chapter 116 was passed, the Thornton parties concentrated their efforts on attacking the multi-member districts in the forum provided by Congress under the Voting Rights Act, *i.e.*, by urging the Attorney General to enter an objection to the multi-member districts pursuant to section 5 of that Act, 42 U.S.C. § 1973c. Those efforts succeeded when, on May 7, 1971, the Attorney General did enter a section 5 objection to the multi-member districts in the five cities named above. On May 24, 1971, the district court held that the Attorney General's objection was dispositive, enjoined enforcement of Chapter 116, and gave the General Assembly three weeks to draw a new plan curing the Attorney General's objections.

On June 7, 1971, this Court held in *Whitcomb v. Chavis, supra,* that multi-member districts in Marion County, Indiana, had not been shown to discriminate. Three days later, on June 10, 1971, the Attorney General withdrew his section 5 objection to the multi-member districts in the five large Virginia cities. The district court hearing followed six days later.

In that brief time, the Thornton parties (who were now left only with a traditional *Whitcomb*-type fourteenth and fifteenth amendment claim) were able to establish some of the elements of proof that black voters in the five Virginia cities have "less opportunity than [do other Virginia] residents to participate in the political process and to elect legislators of their choice." *Whitcomb, supra,* at 149. They showed that there is a

history of discrimination against black voters in Virginia, and that black candidates have had notable lack of success in elections when pitted against white candidates.

Because of the shortness of time, however, there was no opportunity to prove other elements of their case against the multi-member districts. Those elements, which the Thornton parties are now preparing to prove in a trial on the merits in the district court, would include evidence that the history of disfranchising black voters in Virginia has left a legacy in which race plays a decisive role in politics, as shown by the unwillingness of many white voters to support candidates who are black or who are favored by black voters, the use of racial appeals in political campaigns, the inability of blacks to form coalitions with other interest groups, and, overall, the isolation of black voters as a specially disfavored permanent minority destined for constant defeat at the hands of the controlling (white) majority. In these circumstances, the Thornton parties would seek to show that the compensating advantage ordinarily enjoyed by a minority group in a multi-member district—*i.e.*, the ability to exercise some influence over a larger number of representatives—is effectively denied black voters because of their isolated position.[2]

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[2] As to Richmond (District 33), in particular, the evidence would also show that a recent annexation of some 46,000 white people has transformed the city into a five-member, majority-white district, from what would otherwise have been a four-member, majority-black district. The Attorney General has made and maintained a section 5 Voting Rights Act objection to the annexation on the ground that eliminating the black majority while maintaining at-large elections (for City Council) would have a discriminatory effect. *See* Holt v. City of Richmond, 406 U.S. 903 (1972). The Thornton appellees would seek to show in this case that the annexation likewise had a discriminatory effect on the at-large elections for the Richmond House of Delegates seats.

Proof of this sort should establish that the multi-member districts effectively abridge black voters' right to vote, and therefore should require a holding that the multi-member districts violate the fourteenth and fifteenth amendments. *See Graves v. Barnes,* ____ F. Supp. ____ (W.D. Tex. 1972) (three-judge court), *stay denied,* 405 U.S. 1201 (1972) (Powell, Jr.); *Sims v. Amos,* 336 F. Supp. 924 (M.D. Ala. 1972) (three-judge court); *Bussie v. Governor of Louisiana,* 333 F. Supp. 452 (E.D. La. 1971), *aff'd as to invalidity of multi-member districts,* 457 F.2d 796 (5th Cir. 1971). *Compare Taylor v. McKeithen,* ____ U.S. ____ (June 12, 1972); *Lipscomb v. Jonsson,* 459 F.2d 335 (5th Cir. 1972).

III.

The district court, in its interlocutory order, held Chapter 116 invalid on the ground that it included provisions "violating the equal protection clause of the Constitution of the United States." 330 F. Supp. at 1150. In its opinion, the court held that "the State has proved no governmental necessity for strictly adhering to political subdivision lines." 330 F. Supp. at 1140. The appellants urge that the district court decision be reversed and that this Court "affirm the validity" of Chapter 116. Brief on Behalf of Appellants in No. 71-364, p. 75.

Because of the posture of the case now proceeding in the district court, the Thornton appellees oppose the prayer of the appellants and urge this Court to limit any holding it may make to the precise facts and issues before it, without prematurely deciding any issue relating to the

question whether the multi-member districts in this case do or do not discriminate against black voters.[3]

Respectfully submitted,

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[3]This case is ripe, however, to decide whether the use of multi-member districts (at-large or floterial) which *combine* political subdivisions is rational. Under Chapter 116, 15 multi-member districts contain such combinations (Nos. 1-3, 6, 8, 9, 11, 13, 15-17, 20, 24, 26 and 36), in addition to four floterial districts. The district court's plan continued this pattern, but aggravated it by combining pieces of subdivisions in multi-member districts, most notably in District No. 39, where a part of Virginia Beach was added to Norfolk in a seven-member district.

Such a plan is irrational because the only justification for multi-member districts is the desire to keep a single political subdivision together. *See* Abate v. Mundt, 403 U.S. 182 (1971); Lucas v. Colorado General Assembly, 377 U.S. 731 n. 21 (1964). Combining subdivisions in multi-member districts does nothing to preserve the territorial integrity of any of the components, and this Court has never upheld such a technique against a square attack (although it has discussed the technique in some cases without condemning it, *e.g.*, Davis v. Mann, 377 U.S. 678, 686-87 (1964)). For the reasons set forth at pp. 26-32 of the brief of appellant City of Virginia Beach (No. 71-373), this Court should hold that, even without regard to racial considerations, a multi-member district is presumptively valid only where it comprises but a single political subdivision. Any other use of multi-member districts achieves only mathematical correctness at the expense of political reationality.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 71-364

JOAN S. MAHAN, SECRETARY,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

HENRY E. HOWELL, JR., ET AL,
Appellees.

No. 71-373

CITY OF VIRGINIA BEACH,
Appellant,

v.

HENRY E. HOWELL, JR., ET AL,
Appellees.

Appeal From The United States District Court for the Eastern District of Virginia

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BRIEF FOR APPELLEES, HENRY E. HOWELL, JR., ET AL

I. QUESTIONS PRESENTED

(a) Can an artificial allocation of citizens to a legislative district meet the constitutional requirement for equal representation?

(b) Where the Negro population constitutes a minority of an entire area, do single member districts unconstitutionally dilute the vote of such minority?

(c) Where a legislative body has twice failed to enact a constitutional plan of reapportionment, and where an election deadline is imminent, does a three Judge Court possess the discretionary power to decree a seasonable constitutional plan of reapportionment? 1/

II. STATEMENT OF THE CASE

The brief submitted on behalf of appellants, Joan S. Mahan, Secretary,

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1/ This brief filed in Cases 71-364 and 71-373 is limited to the propriety of the action of the Court below in ordering At Large elections for Three Senators from the City of Norfolk and a portion of Virginia Beach in order to diffuse the impact of a substantial military population.

State Board of Elections, et al, fails to comply with Rule 40(1)(e), requiring a statement of the case containing all that is material to the consideration of the questions presented and for that reason a completely independent statement of the case is here set forth.

A. PARTIES

(1) Appellees

The appellees, plaintiffs below, are all citizens of Norfolk, Virginia. Henry E. Howell, Jr., and Peter K. Babalas were, at the time of the filing of the complaint, State Senators elected from the City of Norfolk At Large and resided in the Fifth and Sixth Senatorial Districts, respectively. Angeline Fitzpatrick resided in the Sixth Senatorial District. Reverend Lawrence L. Craig resided in the Fifth and William K. Beach in the Seventh Senatorial District. Appellees will hereinafter be referred to as "VOTERS".

(2) Appellants

Appellants, defendants below, are Joan S. Mahan, Edgar A. Prichard and U.P. Joyner, Jr., the three members of the State Board of Elections; the Honorable A. Linwood Holton, Governor of Virginia; Terry H. Davis, Jr., James Griffiths, J. Hume Taylor, Jr., the three members of the Electoral Board of the City of Norfolk, Virginia; and John B. James, Donnell P.

Davis and Catherine Nixon, the three members of the Electoral Board of the City of Virginia Beach, Virginia. Appellants will hereinafter be referred to as "OFFICIALS".

(3) Intervenors

The cities of Norfolk and Virginia Beach intervened in VOTER's suit for the sole purpose of retaining the total number of inhabitants allocated to their respective cities by the census enumeration because of the economic effect the figures have on the allocation of federal funds, the City of Norfolk contending for an enumeration of 307,951 persons and the City of Virginia Beach for 172,106. Intervenors will be hereinafter referred to as "NORFOLK" and "VIRGINIA BEACH".

B. CONTROLLING FACTS

In 1960, a legislative-citizen study Commission was appointed by Governor J. Lindsay Almond, Jr., to recommend a plan for reapportioning the State Legislature. Governor A. Linwood Holton in 1970 recommended a similar type Commission, but, instead, the Privileges and Elections Committee of the Senate and House of Delegates handled the study. (Andrews, Depo.p.6-7).

The Senate Privileges and Elections Committee was to deal with the Senate and the House Committee with the House.

Initial meetings were held in June and July of 1970 and a sub-committee was constituted. There was no representation from Norfolk, Virginia Beach or Portsmouth on the Senate Privileges and Elections Committee.

The sub-committee decided upon the tentative new Congressional Districts. Four (4) State Senators were allocated by the sub-committee to each of the Ten (10) Congressional Districts and the incumbent Senators within the new Congressional Districts were invited to agree on a plan of reapportionment and redistricting of their Senate seats within the Congressional Districts.

NORFOLK and a portion of VIRGINIA BEACH were allocated Four (4) State Senators and Senator Hunter B. Andrews, as Chairman of the sub-committee, requested Edward L. Breeden, Jr., Senior Senator of Norfolk, to confer with the other three incumbent Senators, Howell, Babalas and Caton, as to their preference with respect to various plans, ranging from four Senators to be elected At Large from the new Second Congressional District to separate Senatorial Districts for each of the four Senators. (App. 121)

Senator Andrews' letter (Plaintiffs' Ex. 18, App. 160) stated that the Attorney General of Virginia had advised that adherence to mathematical exactness

was mandatory. 2/

The enumeration of the 1970 census fixed Virginia's total population at 4,648.494 persons, an increase of 681,545 persons, or 17.2% from the 1960 enumeration. (Plaintiffs' Ex. 14)

NORFOLK's total population was 307,951 persons. (Plaintiffs' Ex. 14) A breakdown of NORFOLK's population by race is 215,255 White persons, 87,275 Negro persons and 5,621 others. (Plaintiffs' Ex. 13, App.151)

The total population of VIRGINIA BEACH was 172,106 persons. (Plaintiffs' Ex.14) A breakdown of VIRGINIA BEACH's population by race is 154,828 White persons, 15,688 Negro persons and 1,590 others. (Plaintiffs' Ex. 13, App.151)

Each Senator in Virginia would ideally represent 116,212 persons.

The Senate Privileges and Elections Committee waited until February 1971, and when the Four (4) State Senators from the new Second Congressional District could not agree on a plan of redistricting for their area, the Committee made a decision to divide NORFOLK into Senatorial Districts and directed a staff member of

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2/ All of VOTERS' exhibits were introduced by stipulation. (App.120).

the State Division of Statutory Research and Drafting to run the District lines in a North-South direction, but to count all Naval Personnel assigned aboard vessels as if they resided in District Five. (Andrews, Depo.p.31) 3/

For the first time in history, NORFOLK was divided into Senatorial Districts Fifth, Sixth and Seventh, the Seventh District including 40,195 persons from a portion of Kempsville and Bayside Boroughs of Virginia Beach.

The Bureau of Census, for the purposes of economy and convenience delegated to the Navy the enumeration of personnel aboard ships home ported at NORFOLK and directed that the men be counted aboard the ships, even though they resided with their families in other areas of NORFOLK that would lie without Senatorial District Five and within the Sixth and Seventh Senatorial Districts. (Plaintiffs' Ex. 10, App.138-144).

The enumeration of naval personnel stationed aboard ships home ported at Norfolk was 36,693 and these men were

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3/ The ultimate District Lines approved by the Department of Justice are described in Senate Bill 125,Chapter 246 Acts of Assembly.(Joint App.31) The lines divide blocks,precincts and even lakes.

assigned to a census tract designated as 000999, the location of a series of ship piers. (Plaintiffs' Ex. 2, App. 124; Plaintiffs' Ex. 29, App. 287) 13,437 persons were enumerated ashore, but within the naval reservation, these persons living in various government quarters. These persons were assigned to census tract 0009. (Plaintiffs' Ex. 2, App.124)

The Commander in Chief, Atlantic Fleet Headquarters, uses a rule of thumb which indicates that Fifty Per Cent (50%) of the men assigned to Atlantic Fleet afloat units occupy housing ashore. (Plaintiffs' Ex. 6, App. 130)

On April 1, 1970, the Commandant, Fifth Naval District, constituted a housing survey by an approved sampling method survey technique. The total sample of 544 persons were allocated by zip code. (Plaintiffs' Ex. 10, App. 138-144) 4/

Professor T. J. Reed analyzed the official Naval Housing Survey results as of April 1970, the same month of the

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4/ Dr. Conrad F. Taeuber, Associate Director of the Bureau of the Census, approved the use of zip codes as a reasonable device for the approximation of resident localities. (Taeuber, App.219)

census enumeration and made a statistical determination that of the 36,693 persons enumerated by the Navy as being members of the crew of vessels home ported at Norfolk, Fifty-nine (59%) per cent or approximately 21,600 maintained local residences outside the Fifth Senatorial District, reducing the actual population of the Fifth District to 94.484 persons. (Plaintiffs' Ex. 9, App. 134-137)5/

5/ Professor Reed, of the School of Business Administration of Old Dominion University, had 30 years' experience in census and sample surveys. He had first worked for the Bureau of Census in the taking of the 1940 census and in 1967 he was one of thirteen persons in the nation appointed to the National Defense Executive Reserve Program and Census Activities by A.B. Trowbridge,Secretary of Commerce. Professor Reed was to serve as a back-up census authority in the event of a national catastrophe. (Plaintiffs' Ex. 21,App. 165; Plaintiffs' Ex. 23, App. 166.)

Mr. Bernard L. Michel, Management Assistance Officer for the Commandant, Fifth Naval District, had as one of his responsibilities the task of advising the Commandant regarding Naval personnel stationed at Norfolk, including the living habits of men assigned to the Atlantic Fleet. Mr. Michel states that only a small percentage of the approximate Fifty (50%) per cent of the members of crews of home ported vessels who live ashore, live within the Fifth Senatorial District. (Plaintiffs' Ex. 5, App.127)

Professor Reed determined that only about 8,450 men actually lived aboard the vessels on which they had been enumerated. (Plaintiffs' Ex. 9, App. 136)

Naval Regulations prohibit any campaigning on naval property, where over 50,000 of the 116,084 persons artificially allocated to the Fifth District were enumerated, and a violation of this regulation constitutes a federal crime. (Plaintiffs' Ex. 7, App. 131)

In implementing its overnight decision to create single member districts, the Senate Privileges and Elections Committee used the United States Census, which was performed primarily for the purpose of congressional apportionment. (Taeuber, App.214) No specific standards were established for the purpose of redistricting state legislative bodies.

(Taeuber, App.218)

Assistant Director of the Census, Taeuber, established that a principle of counting naval personnel aboard vessels was that the individual lived outside of the Fifth District and in a general area encompassed by the Fifth, Sixth and Seventh Districts. (Opinion of Court, Joint App. 20) 6/

The Senate had established its determination to allocate all home ported naval personnel to the Fifth District, notwithstanding knowledge of the artificiality of the count by reason of the distribution of seamen living with

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6/ Representative of home ported seamen who lived at home was Larry B. Wood of the Aircraft Carrier JOHN F. KENNEDY. He maintained a home in the Seventh District and was a registered voter of Norfolk. (App. 192-193.)

their families ashore. 7/

Following a hearing on May 24, the District Court postponed the statutory date for the Primary from June 8 to September 14, and gave the General Assembly until June 14 to enact a valid plan of reapportionment. The Court stated that the failure of the legislature to do so would require the Court to formulate a plan. The State failed to comply with the Court's order and after a second hearing on June 16, the Court was forced to reapportion the legislature, in view of the July 16 deadline for the filing of candidacies.

7/ VOTERS,Howell and Babalas,had presented evidence of Admiral Cobb (Plaintiffs' Ex. 6,App. 130) and Bernard Michel (Plaintiffs' Ex.5,App.127) to the Senate prior to its vote. The evidence was ignored. The evidence was further documented and implemented and filed with the Court prior to the Court's initial hearing,which was adjourned to allow the General Assembly to reapportion itself in a constitutional manner. Again, the Senate ignored the residential factor of a substantial number of military personnel when it passed Senate Bill 125. (Chapter 246,Acts of Assembly, Joint. App.31).

III. ARGUMENT

A. AT LARGE REPRESENTATION IS REQUIRED IN THE CITY OF NORFOLK IN ORDER TO HAVE CONSTITUTIONAL REPRESENTATION OF 50,120 NAVAL PERSONNEL

This Court in establishing the principle of "one person - one vote", brought to the nation a needed revitalization of representative government. Legions of legislative bodies have been reapportioned because of the consistency of this Court's decisions since Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964) and Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441 (1964).

Legislators soon learned that this Court would not tolerate any blinking of the principle of "one person - one vote". The burden was placed upon the proponent of any districting plan to justify deviations from equality. Wells v. Rockefeller, 394 U.S. 542, 89 S.Ct. 1234.

Neither NORFOLK nor VIRGINIA BEACH justified the substantial deviation from equality that characterized the legislative drawn Senate plan.

No evidence was presented by NORFOLK or VIRGINIA BEACH to contradict VOTERS' evidence that of the 36,693 naval personnel assigned to vessels home ported

at Norfolk, 21,600 maintained local residences outside of the Fifth Senatorial District and primarily in the area constituting Districts Six and Seven. 8/

Judicial recognition of "phantom populations" would constitute a reversal of the principle of "one person - one vote" and would violate the rights guaranteed to VOTERS under the Fourteenth Amendment.

8/ (Opinion of Court, Joint App.19)

"To do so,however,the entire count of 36,693 naval personnel 'home ported' at the U.S.Naval Station,Norfolk, were assigned to the Fifth Senatorial District. Factually, it is without dispute that only 8,100,or so, of such crewmen actually lived aboard the vessels which are assigned to a Census Tract within the Fifth Senatorial District.[6] The remainder,with their families,resides for the most part in the City of Norfolk,but to a considerable degree not in the Fifth Senatorial District.

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[6] Census policy allocates nearly all other individuals to the place where they reside."

The only national significance that can justify review of the lower court's opinion regarding Senate redistricting would be that the affirmance of the lower court decision would offer this court an opportunity to condemn once and for all artificial population counts as a device for evading compliance with VOTERS' constitutional rights.

So far as the instant case is concerned, NORFOLK has historically been a military city. Its naval establishment is reputed to be the largest in the world. Its military population, a substantial portion of which constitute family units stationed in Norfolk, need effective legislative representation to procure the same urban services required of native born Norfolkians; schools, police and fire protection, streets and highways, and, now, effective mass transportation.

The absurdity of single member districts in a military impacted area is underscored by consideration of what would occur if there were single member House Districts. The ideal House District is 46,484 persons and if all of the persons enumerated within the Naval installation were allocated to one House District, the Naval Operating Base would be entitled to a Delegate, and with a majority of the persons subject to military orders, there would probably be no candidate and, certainly, the voter participation would be minimal.

The unconstitutionality of the plan is further contributed to by Naval Regulation 5726.4A dated June 3, 1970 (Plaintiffs' Ex. 7, App. 131), which regulation prohibits solicitation of any type of political support on a naval shore installation and violation of this regulation constitutes a breach of 18 United States Code §1382, which constitutes each violation a misdemeanor and imposes a penalty of up to six months' imprisonment or $500.00 fine, or both.

The equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States of America will not permit senatorial candidates from a district to be politically muzzled with respect to over Forty Per Cent (40%) of the population allocated to their district.

The artificial assignment of sailors to ships instead of to the homes that they occupied with their wives and children while stationed at Norfolk was at war with the controlling principle of the Census Bureau counting people where they actually lived. (Taeuber, Depo. p. 39; App. 221-222.)

The conflict was created when the Census Bureau abandoned its primary responsibility to conduct a head count of citizens who had as their occupation service in the military and delegated the

task to the Secretary of Defense.

The Department of Defense, through the Navy, is structured to defend this nation and to service and supply ships and personnel that constitute the Navy. The Comptroller of the Navy took the easy way out and issued instructions for the commanding officers of each ship to designate a project officer who would certify the total number of personnel aboard the particular vessel 1 April 1970. Significantly, the instructions directed that dependents were to be enumerated where they resided. This created a house divided that would not be applicable to other heads of households.

Dr. Taeuber agreed that a commercial pilot when interviewed at a motel between flights would not be counted in the tract where the motel was located, but would be counted where his wife and children resided. (Taeuber, Depo. 30-31; App. 216,217)

VOTERS' position is that the Census enumeration for Virginia and NORFOLK was accurate, but the enumeration of naval personnel by the General Assembly in its experiment with multi-member districts was inaccurate.

B. THE NEGRO POPULATION OF NORFOLK CONSTITUTED A MINORITY IN EACH OF THE THREE PROPOSED DISTRICTS, UNCONSTITUTIONALLY DILUTING THE VOTE OF SUCH MINORITY

The lower court found that the unconstitutional allocation of all home ported naval personnel to one district, without reference to where they made their homes in the area was dispositive of the case and stated it was unnecessary to descant upon the other grounds urged by VOTERS in support of a unitary senatorial district at Norfolk. (Opinion of Court, Joint App. 20-21).

VOTERS presented evidence, briefs and argument on behalf of their contention that single districts could not constitutionally be drawn and make a majority out of the Negro minority.

The facts are that NORFOLK's total 1970 population was 307,951 persons and of this total 87,275 were Negro citizens.

Recent election history in NORFOLK establishes that the Negro minority has a significant influence in At Large elections.9/

9/ One of NORFOLK's seven delegates is a Negro and one of Norfolk's seven Councilmen is a Negro.

The voting citizens of the Thirty-One (31%) Per Cent minority vote constitute the margin of victory in any close election and all Senators and others running for public office attempt to be sensitive to their particular needs and seek their votes.

When the Department of Justice rejected the original District lines an effort was made to place as many of the Negro citizens as possible into the Sixth District, leaving a relatively insignificant number in Districts Five and Seven. The lines of District Six were drawn so as to prefer by race and color, which had the effect of diluting the influence of the Negroes remaining in Districts Five and Seven.

Instead of having the ear of three Senators in an At Large election, the minority would have the ear of only the one Senator who sought the votes of a significant minority in the Sixth District.

The Virginia Senate redrew its racially divided lines prior to this Court's opinion in Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858 (1971). In Chavis, this Court noted at 403 U.S. 143, 144, that it had summarily affirmed a three-judge District Court ruling in Burnette v. Davis, (245 F.Supp.241,245,E.D.Va.1965). There Judge Albert Bryan stated:

"* * * No line may be drawn to prefer by race or color."

The Senate single-member districts violated this holding.

In Chavis, 403 U.S. 144, 147, this Court reaffirmed the validity of multi-member districts.

In footnote 34 to the Whitcomb v. Chavis opinion, 403 U.S., 144,155, this Court approved the dicta in Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, (1964) that any district created to favor on the basis of race or place of origin would be unconstitutional for it would deny equal protection to the disfavored race, be it Black, White, Puerto Rican, Mexican or otherwise. Justice Douglas in his dissent, which was cited in part by Judge Bryan in Burnette, was more pointed in his criticism of ethnic or racially favored districts. Justice Douglas stated at page 66 of 376 U.S.:

"* * * That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. * * *

* * *

When racial or religious

> lines are drawn by the State, the multiracial, multireligious communities, that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here."

Judge Bryan in Burnette, 245 F.Supp. 245, cited with approval that portion of Justice Douglas' dissent, 376 U.S. 62:

> "* * * Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards."

Justice Douglas' dissent is now accommodated to by the majority opinion in Whitcomb v. Chavis, with the holding at 403 U.S. 156:

> "The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with

distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans or members of any political organization in Marion County, who live in what would be safe districts in a single-member district system, but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our hetrogeneous cities and urban areas. Indeed, it would be difficult, for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests. At the very least, affirmance of the District Court would spawn endless litigation concerning multi-member district

systems now widely employed in this country."

Reversal of the lower court's decree, which found that a multi-member Senatorial District was required by the peculiar characteristics of the NORFOLK area would, indeed, unnecessarily spawn endless litigation, which the federal judiciary system does not need or desire.

C. CONTINUED VIABILITY OF THE FEDERAL JUDICIARY REQUIRES THE AFFIRMANCE OF THE IMPLEMENTATION POWERS OF TRIAL COURTS UNDER THE CIRCUMSTANCES OF THIS CASE

The General Assembly of Virginia that undertook to reapportion the state legislature was acting under the mandate of a newly adopted amendment to the Constitution of Virginia, which required state reapportionment and congressional

reapportionment to be accomplished on the identical basis.10/

10/ Constitution of Virginia, Article II,Section 6. Apportionment.

Members of the House of Representatives of the United States and members of the Senate and House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

Any such reapportionment law shall take effect immediately and not be subject to the limitations contained in Article IV,Section 13, of this Constitution. (Emphasis Added)

The Attorney General of Virginia had advised the Senate Privileges and Elections Committee that any plan must adhere to mathematical exactness. This advice was relayed by Senator Andrews when he requested that Senator Edward L. Breeden, Jr., confer with the incumbent Senators in an effort to reach a mutually accommodating plan: (Plaintiffs' Ex.18, App. 160)

> "* * * We have had the advice of the Attorney General and in essence we must adhere to mathematical exactness. * * *" (Emphasis Added)

Notwithstanding this mandate, the General Assembly ignored it. Suit was brought and initial hearing was held on May 24, 1971. Pending elections were postponed to September 14, and the General Assembly given a second chance or until June 14 to constitutionally reapportion the legislature. On June 16, a second hearing was held and on July 2, fourteen (14) days before the filing deadline for the September Primary, the Court finding the plan wanting and the legislature reluctant, implemented its decree by reapportioning the General Assembly.

The Court could reapportion without being subject to the delay of a review by the office of the Attorney General of the United States. Conner v.Johnson,

402 U.S. 690, 91 S. Ct. 1760 (1971).

The citizen is entitled to the opportunity to cast his vote in an election untainted by an unconstitutional plan of apportionment.

The whole cloth of government can be eaten up by doubt, challenges and litigation when legislators are elected under an unconstitutional plan.

If the people of Virginia had been required to vote for a Senator representing an artificially populated district and malapportioned House districts, their mandate expressed in a constitutional amendment requiring mathematical exactness would have been thwarted and aborted.

This Court has consistently recognized the necessity of affirming the right of trial courts to fashion remedies where legislators have failed to reapportion according to federal constitutional requisites in a timely fashion, after having had

an adequate opportunity to do so. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964) 11/

11/ 377 U.S. at 585, 84 S.Ct. at 1393-4:

> "*** Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan * * * As stated by MR. JUSTICE DOUGLAS, concurring in Baker v. Carr, 'any relief accorded can be fashioned in the light of well-known principles of equity.'".

The lower court's action in re-apportioning the General Assembly under the circumstances of this case was meet, right and just.

IV. CONCLUSION

For the reasons stated, it is submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

HENRY E. HOWELL,JR.
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ANGELINE V.FITZPATRICK
REVEREND LAWRENCE L.CRAIG
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CERTIFICATE

I, Henry E. Howell, Jr., of counsel for appellees, a member of the Bar of the Supreme Court of the United States, hereby certify that three (3) copies of the foregoing Brief For Appellees, Henry E. Howell, Jr., et al, were on this 10th day of August, 1972, mailed to Edmund D. Campbell,Esquire, Counsel for appellees, Clive L.DuVal,II, et al, 1425 H. Street, N.W.,Suite 822,Washington,D.C. 20005; Stanford E. Parris,Esquire, counsel for appellees, Stanford E. Parris, et al., 4085 Chain Bridge Road, Fairfax, Virginia, 22030; Gordon B. Tayloe,Jr.,Esquire, Assistant City Attorney of the City of Norfolk, counsel for defendant-intervenor, City of Norfolk, 908 City Hall Building, Norfolk, Virginia, 23501; John Ashton, Esquire, counsel for defendant-intervenor, City of Virginia Beach, c/o Messrs. Hunton,Williams, Gay, Powell and Gibson, P.O.Box 1535, Richmond,Virginia,23212; Armand Derfner, Esquire, Lawyers' Committee for Civil Rights Under Law, 520 Woodward Building, 733-15th Street,N.W., Washington, D.C. 20005, counsel for plaintiff-intervenors, William S. Thornton, et al; Andrew P. Miller,Esquire, Attorney General of Virginia, Vann H. Lefcoe, Assistant Attorney General, of counsel for appellants, Joan S. Mahan, et al, Supreme Court-State Library Building, Richmond, Virginia, 23219, and Anthony F. Troy, Esquire, Special Assistant Attorney General, c/o Messrs. Dickstein,

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required to be served have been served.

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et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

FILED

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No. 71-364

JOAN S. MAHAN, SECRETARY, STATE BOARD OF ELECTIONS, *et al.*,

Appellants,

v.

HENRY E. HOWELL, JR., *et al.*,

Appellees.

No. 71-373

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEE CLIVE L. DuVAL, 2D

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEE CLIVE L. DuVAL, 2D

STATEMENT OF THE CASE

The appeals in this case are taken from an interlocutory order of the United States District Court

for the Eastern District of Virginia reapportioning the House of Delegates and Senate of the Virginia General Assembly. The order and the opinion of the Court below are reported in *Howell v. Mahan*, 330 F. Supp. 1138 (E.D. Va. 1971) and are set forth in J.A. 1-25.

Appellants, defendants below, include the Secretary of Virginia's State Board of Elections and the members thereof. Another appellant is the defendant intervenor City of Virginia Beach. Appellees, including this appellee DuVal, plaintiffs below, are registered and qualified voters of Virginia.

The instant appeals arise out of three separate suits brought by plaintiffs in the District Court seeking to enjoin the State Board of Elections and other Virginia officials from conducting elections in 1971 to the Virginia General Assembly from House of Delegates and Senate districts constructed by the Virginia legislature.

The act challenged by DuVal and other residents of Northern Virginia[1] in *DuVal v. Prichard*[2] and by Parris, *et al.* in *Parris v. Prichard*[3] divided the 100-member House of Delegates into fifty-two legislative districts.[4]

---

[1]As used herein, Northern Virginia means the Counties of Arlington, Fairfax, Loudoun and Prince William and the Cities of Alexandria, Fairfax and Falls Church. For certain State purposes, these jurisdictions are grouped in State Planning District Eight (A. 67, p. 2).

[2]Filed in the Richmond Division as Civil Action No. 174-71-R (App. 47-64) on March 8, 1971. *DuVal* complaint is set forth at A. 47-64.

[3]Filed in the Alexandria Division as Civil Action No. 111-71-A (App. 14-27) on March 22, 1971. *Parris* complaint is set forth at A. 14-28.

[4]Chap. 116 of 1971 Acts of Assembly (J.A. 27-30).

That attacked by Howell, *et al.* in *Howell v. Mahan*[5] divided the Senate into forty single member districts.[6] The *DuVal* and *Parris* suits alleged that the 1971 House of Delegates reapportionment statute created many districts with substantial and constitutionally impermissible disparities in population, and that most Northern Virginia districts were seriously under-represented. Plaintiffs in these two actions did not challenge the 1971 Senate reapportionment act.

According to final 1970 census figures, the populations of the fifty-two House of Delegates districts created by the Virginia General Assembly varied from 39,991 per House seat or 14% below the optimum population of 46,485 per House seat to 50,964, 9.6% above the optimum. The difference in population between the smallest and largest House seats was 10,973 or 23.6% (A. 39; J.A. 4, footnote; brief of Appellants Mahan *et al.*, p. 7; plaintiff DuVal's trial brief, p. 2, and exhibit PX-11, p. 6, in District Court).

Virtually every House seat in Northern Virginia was under-represented. Except for Alexandria's seats,[7] all House seats in Northern Virginia were under-represented from 3.9% to 6.3%. Including Alexandria, each House seat in Northern Virginia was under-represented an average of more than 4.3% per seat (A. 39-40; J.A. 10, footnote). Northern Virginia as an area was represented

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[5] Filed in the Norfolk Division as Civil Action No. 105-71-N (App. 93-110) on March 3, 1971. *Howell* complaint is set forth at A. 95-109.

[6] Chap. 120 of 1971 Acts of Assembly.

[7] Alexandria's seats (Twenty-first district, plus Twenty-third "floater" district with the equivalent of 2.39 seats) were close to optimum population, being over-represented by 0.1% (J.A. 10).

by nineteen Delegates, one less than it was entitled to population-wise. Conversely, most of the jurisdictions in the Tidewater area[8] were over-represented. During the 1960-1970 decade, the average annual growth rate of Northern Virginia was more than triple that of the Tidewater, and during the 1970-80 decade it is estimated to be 2.4 times that of the Tidewater area.

The three suits brought below were consolidated for trial in the District Court and set for hearing on May 24, 1971.

On May 7, 1971, the United States Attorney General, acting pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Sec. 1973 (c), objected to the multi-member House districts in five urban areas and also objected to the line demarcating the boundary between the 5th and 6th Senatorial Districts in Norfolk (J.A. 51-53).

The hearing on May 24 was devoted to arguing the effect of the Attorney General's objection. The court thereupon entered an "Order on First Hearing" (J.A. 43-46) providing: (1) that the trial of the three suits be continued to allow Virginia an opportunity to obtain approval of a reapportionment plan from the United States District Court for the District of Columbia, as provided in the Voting Rights Act, (2) that the primary elections originally set for June 8, 1971, be postponed until September 14, 1971, and (3) that the court would proceed with trial of the three suits and thereafter itself

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[8]As used herein, Tidewater area means the Counties of Isle of Wight, Nansemond and Southampton and the Cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach. For certain State purposes, these jurisdictions are grouped in State Planning District Twenty (A. 67, p. 4).

formulate a reapportionment plan resolving valid objections, if any, of the plaintiffs, unless prior to June 15, 1971, Virginia had submitted a reapportionment plan to the United States Attorney General for his approval or had sought a declaratory judgment from the United States District Court for the District of Columbia.

Before the June 15 deadline, this Court handed down its opinion in *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L.Ed. 2d 363 (June 7, 1971). Thereupon, the Attorney General withdrew his objection to the reapportionment plan for the House of Delegates (J.A. 53). On June 14, 1971, the General Assembly adopted Chapter 246, Acts of Assembly of 1971 (J.A. 31-43), which amended Chapter 120 to revise the line between the Fifth and Sixth Senatorial Districts, thereby eliminating the Attorney General's sole objection to the reapportionment plan for the Senate (J.A. 54-55).

The trial of the three actions below was heard by the consolidated District Court on June 16, 1971.

On July 2, 1971, the District Court filed an opinion (J.A. 1-22) and entered an interlocutory order (J.A. 23-25), holding the redistricting plans enacted by the General Assembly invalid as violating the Equal Protection Clause of the United States Constitution. The District Court's opinion included a reapportionment plan for both the House of Delegates and the Senate.

With regard to the Assembly's Senate reapportionment plan the Court made only one change, converting three single member Senatorial districts serving Norfolk and a portion of Virginia Beach into a multi-member district.

The Court's plan for the House of Delegates consisted of the General Assembly's redistricting proposal with necessary amendments to some of the legislative districts.

Twenty-six of the fifty-two House of Delegate districts were altered; the balance were left untouched. The most significant change was to transfer one Delegate seat from the Tidewater area to Northern Virginia to correct the under-representation of the latter region. In this connection, the Court said (J.A. 18):

> This is the only instance in which a delegate is transferred from one sector of the State to another. It is justified by the pervasive under-representation in districts in Northern Virginia, and over-representation in Tidewater, as earlier explained.

The District Court further stated (J.A. 21-22):

> While we have endeavored to reach a perfect mathematical division, we have been unable to do so because of the multiplicity of delegates, the geography of the State and the diversity of population concentrations. The highest degree of under-representation is 3.8% (Thirty-eighth), with the largest over-representation 3.4% (Thirty-third, Thirty-fourth and Thirty-fifth).

The Court footnoted this statement (J.A. 22, footnote 8) by pointing out that "In this arithmetic Accomack and Northampton counties have not been included. The new reapportionment has not involved them because of their isolation from the remainder of the State. They make up the narrow peninsula separated from Virginia's mainland by Chesapeake Bay and the Atlantic Ocean. Their exception does not materially affect the submitted plan." These two counties (Forty-sixth district, with one Delegate) were over-represented by 6.5% (J.A. 15-16). Thus, total variation under the Court's plan between smallest and largest Delegate districts was 7.2%[9] if the Forty-sixth district was not included and 10.3% if it was.

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[9]Actually, 8.3% if "floater" districts were given weight; see footnote 9 to Court's opinion (J.A. 22).

The opinion of the four judges sitting as three-judge District Courts was substantially unanimous (Judge Lewis filed a separate concurring and dissenting opinion, fully agreeing with all aspects of the ruling except for the Court's refusal to place all of Fairfax County in one eleven-member district).

Following issuance of the opinion and interlocutory order of the District Court on July 2, 1971, two lower court judges were requested to stay the order of the District Court but refused to do so. Applications were then made to this Court for a stay of the judgment and order of the lower court, but on July 27, 1971 Mr. Justice Black, Acting Circuit Justice, refused to do so (*Mahan v. Howell*, 404 U.S. 1201, 92 S.Ct. 1, L.Ed.2d (1971), stating in part as follows:

> The case is difficult; the facts are complicated; the four district court judges deciding the case had no difficulty in reaching their conclusion on the constitutional questions or in devising a plan to correct the deficiencies they found; the delay incident to review might further postpone important elections to be held in the State of Virginia should the stay be granted. These and other considerations which need not be stated lead me to believe that four Members of the Court are not likely to grant an appeal and therefore I decline to enter an order which would in effect stay the judgment of the consolidated three-judge court. 92 S.Ct. at 2.

Elections to the General Assembly were held on November 9, 1971, under the District Court's plan. Delegates and Senators were elected and sworn into office, and the Assembly as reconstituted under the Court's plan conducted the Commonwealth's legislative affairs at the regular session held January-March, 1972.

The next session of the General Assembly will be held January-February, 1973. No elections for the General Assembly are scheduled until the Fall of 1973.

SUMMARY OF ARGUMENT

I

This Court has held that there must be an honest and good faith effort to construct legislative districts as nearly of equal population as is practicable, and that only minor deviations from population equality can be justified. The deviations from population equality contained in the 1971 House of Delegates reapportionment act (14% below the population norm per seat to 9.6% above, total 23.6%) are not minor and manifestly are of such magnitude that they are constitutionally impermissible.

II

The Commonwealth of Virginia has disregarded the boundary lines of political subdivisions in its Congressional, Senate and House of Delegates redistricting plans. Further, the Virginia Constitution requires that *every* electoral district, legislative as well as Congressional, shall be constituted on the equal population principle. Therefore, Virginia no longer has a tradition or custom of maintaining the integrity of political subdivisions in reapportionment statutes, and the State can no longer seek to justify the large deviations from population equality contained in the 1971 House of Delegates reapportionment act on that basis.

III

Almost every House seat in Northern Virginia was under-represented in the General Assembly's 1971 House of Delegates reapportionment plan; and as an area, Northern Virginia received one less Delegate seat than its population merited, despite the fact that it was and is by far the fastest growing region in the State. In contrast, most of the seats in the Tidewater area of Virginia were over-represented, while growth rates for all Tidewater jurisdictions were far smaller than those of Northern Virginia counties and cities. The District Court summarized this situation as one of "pervasive under-representation in districts of Northern Virginia, and over-representation in Tidewater" (J.A. 18). Under rulings of this Court, the 1971 House of Delegates reapportionment plan was plainly unconstitutional because it was an apportionment structure which discriminated against one geographic area of Virginia and conversely had a "built-in bias" favoring other geographic areas of the Commonwealth, particularly the Tidewater.

IV

Because time was of the essence, the District Court did not have time to refer the House of Delegates reapportionment plan back to a stubbornly resisting General Assembly, subsequently review whatever new plan the Assembly adopted, correct such plan as necessary, and order it into effect—at least without seriously interfering with Virginia's election processes. Under rulings of this Court, the lower court had wide latitude to correct apportionment inequities, and in so doing it was fully entitled to consider population growth trends throughout

Virginia. The District Court's plan, which restored a Delegate seat to Northern Virginia and in other respects significantly reduced the dilution of Virginians' right to vote, is a reasonable one and meets all constitutional tests laid down by this Court.

V

The General Assembly elected in November, 1971 under the lower court's reapportionment plan is the only legislature the Commonwealth has. If this Court were now to declare such plan invalid and reinstate the General Assembly's reapportionment plans, the result would presumably be to oust present members of the legislature. Such an effort to unscramble the eggs could accomplish no useful purpose and would create a legislative vacuum in Virginia. Further, the lower court has retained jurisdiction in this matter. Thus, the General Assembly could, if it desires, enact a new House of Delegates reapportionment plan, which could and presumably would be submitted for review to the District Court. If any such new plan is approved or modified by the District Court and appeals are again taken to this Court, this Court would then have before it an appeal from a *final* judgment rather than from an *interlocutory* one, as is the case on these appeals. If, on the other hand, the General Assembly fails to enact a new House of Delegates redistricting statute, this would indicate that the legislature no longer feels that the lower court's plan is unacceptable. As a practical matter and under the circumstances here present, it is unnecessary and undesirable for the Supreme Court to give further consideration to this case at this stage.

ARGUMENT

I

THE POPULATION DEVIATIONS IN THE GENERAL ASSEMBLY'S 1971 HOUSE OF DELEGATES REDISTRICTING PLAN EXCEED THOSE CONSTITUTIONALLY PERMISSIBLE UNDER THIS COURT'S RULINGS

The General Assembly's 1971 House of Delegates redistricting plan arranged the one hundred members of the House in fifty-two districts, including single member, multi-member, and four "floater" districts of one Delegate each. The "floater" districts were the Twenty-third, Thirty-fifth, Forty-second, Fifty-second (J.A. 10, 13, 14, 15, 17; J.A. 27-30). To determine accurately the plan's deviations from the optimum population per seat, it is of course, necessary to give weight to all seats, including the four "floater" seats. A simple method of so doing[10] was agreed upon in the Court below between appellee DuVal and the Virginia Attorney General, counsel for appellants Mahan *et al.* The Supreme Court has indicated approval of this method of valuing "floater" seats in *Kilgarlin v. Hill,* 386 U.S. 120, 121, 87 S.Ct. 820, 821, 17 L.Ed. 2d 771 (1967), which affirmed

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[10] For example, Alexandria (Twenty-first district) was represented under the Assembly plan by two Delegates; Arlington (Twenty-second) by three Delegates. In addition, the two jurisdictions shared a floater delegate (Twenty-third). Therefore, Alexandria was and is represented mathematically by two Delegates plus a .29 share of the floater district—that being the proportion Alexandria's population (110,938) bears to the total population of the floater district (285,222). Arlington, in turn, was and is represented by the equivalent of 3.61 Delegates. A further description of this method of valuing "floater" seats appears at A. 81-82.

in part and reversed in part *Kilgarlin v. Martin*, 252 F. Supp. 404 (S.D. Texas 1966); see discussion of "flotorial" districts at 252 F. Supp. 419-424.

Applying this agreed method of weighting "floater" districts, the Virginia legislature's plan produced differences in population between the largest and smallest House seats of 23.6%—*not* 16.4% as appellant City of Virginia Beach consistently and inaccurately contends. Appellants Mahan *et al.* concede that the total variance is 23.6% (Brief of appellants Mahan *et al.*, p. 7). More specifically, as heretofore stated, the population represented by a House seat varied from 39,991, which is 14% below the correct mathematical figure of 46,485 to 50,964, which is 9.6% above. The difference in population between the smallest and largest House seats was 10,973 (A. 39; J.A. 4 footnote, plaintiff DuVal's trial brief, p. 2 and exhibit PX-11, p. 6 in District Court).

Appellee submits that under recent rulings of this Court deviations as large as those in the General Assembly's Delegate redistricting plan are without justification and are constitutionally impermissible under the Equal Protection Clause of the Fourteenth Amendment.

In *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the Supreme Court stated (377 U.S. at 577) that the Equal Protection Clause requires a State to make "an honest and good faith effort to construct districts, in both houses of the legislature, as nearly of equal population as is practicable." The Court added (578) that "Somewhat more flexibility may ... be constitutionally permissible with respect to state legislative apportionment than in congressional districting." The Court further indicated in *Reynolds* that a state might legitimately desire to maintain the integrity of

political subdivisions and thus cause some variations in the population of legislative districts, "*so long as . . . the equal-population principle was not diluted in any significant way.*" (377 U.S. at 578–emphasis supplied). The Court also made it clear that it would not set as constitutionally acceptable or unacceptable any fixed standard of percentage deviations from population norms for legislative districts (578).

In keeping with the underscored language of Reynolds, *supra*, this Court has not looked with favor on deviations from population equality in constructing legislative districts of the magnitude here involved.

In *Abate v. Mundt*, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971), the plan before this Court was one developed by the Rockland County Board of Supervisors reapportioning the County Board. The plan resulted in deviations from the population norm of 7.1% above to 4.8% below, for a total deviation of 11.9%. A divided Court upheld the plan, stating that the need for flexibility, the desire to preserve the integrity of political subdivisions, and the limited number of the representatives involved "lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes than in the case of their State or national counterparts." 403 U.S. at 185, 91 S. Ct. at 1907, 29 L.Ed.2d at 402-403. In the course of the opinion, the Court set down certain criteria for legislative apportionment:

> It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections, *Avery v. Midland County*, 390 U.S. 474, 481, 88 S. Ct. 1114, 1118, 20 L.Ed. 2d 45 (1968). "Mathematical exactness or precision is

> hardly a workable constitutional requirement," *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S. Ct. 1362, 1389, 1390, 12 L.Ed. 2d 506 (1964), but deviations from population equality must be justified by legitimate state considerations, *Swann v. Adams*, 385 U.S. 440, 444, 87 S. Ct. 569, 572, 17 L.Ed. 2d 501 (1967). Because voting rights require highly sensitive safeguards, this Court has carefully scrutinized state interests offered to justify deviations from population equality. 403 U.S. at 184-185.

The court concluded with the following significant statement:

> We emphasize that our decision is based on the long tradition of overlapping functions and dual personnel in Rockland County government and on the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas. *And nothing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality.* (Emphasis supplied). 403 U.S. at 187.

Two dissenters (Justices Brennan and Douglas) found the deviations unjustifiable, citing in support *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S. Ct. 1225, 22 L.Ed.2d 519 (1969), and *Wells v. Rockefeller*, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 519 (1969), involving Congressional redistrictings.

The clear inference of *Abate* is that the deviations it upheld (11.9% between largest and smallest districts) are about the maximum permissible for local governments; further, that something *considerably less* in deviations from the population norm is the maximum that adherence to the lines of political subdivisions could justify for a State legislature.

Connor v. Williams, 404 U.S. 549, 92 S. Ct. 656, 30 L.Ed.2d 704 (1972), involved a court-made plan reapportioning the Mississippi legislature. The plan contained a total variance of 18.9% between the largest and smallest Senate districts and of 19.7% between the largest and smallest House districts. The Supreme Court concluded that an election already held under this plan should not be upset, because of the necessity that there be government. But it is significant that the deviations in the scheme for the Mississippi legislature—which are less than those in the Virginia House of Delegates plan—were not approved by the Supreme Court.

In *Kirkpatrick v. Preisler* and *Wells v. Rockefeller, supra,* the Supreme Court struck down Congressional redistricting plans with total variations between largest and smallest districts of 5.97% and 13.1%, respectively, stating in the former:

> [The Constitution] permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown. 394 U.S. at 531.

While these cases may not strictly control the present appeals since they do not involve legislative apportionment, this Court has indicated that they raise serious questions as to whether large variances in State legislative plans, in the range of those found in the General Assembly's 1971 House of Delegates redistricting act, are constitutionally permissible.

Referring to *Preisler* and *Wells,* this Court said in *Connor v. Williams, supra:*

> These decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial ques-

tions concerning the constitutionality of the District Court's plan as a design for permanent apportionment. 92 S. Ct. at 658.

In *Kilgarlin v. Hill, supra,* this Court, reversing the judgment of the lower court in part, found fault with a portion of the District Court's decision "accepting a general county-line justification" for deviations involving over-representation of two legislative districts by 8.6% and 9.2% respectively, and two others by 13% and 13.3% (386 U.S. at 124; see *Kilgarlin v. Martin, supra,* 252 F. Supp. 404 at 424).

As mentioned earlier, the Supreme Court speaking in *Reynolds v. Sims, supra,* said that it would not spell out any precise constitutional tests as to what population variations were or were not permissible in legislative reapportionment cases. The Court added:

> Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation.
>
> * * * * *
>
> Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment. 377 U.S. at 578.

As the Court foresaw, the state and lower federal courts have proceeded to work out just such standards.

There follows a series of court decisions in which state legislative and local government redistricting plans involving *smaller* deviations than the 1971 Virginia House of Delegates plan were *disapproved* by state and lower federal courts:

Cummings v. Meskill, 341 F. Supp. 139 (D. Conn. 1972). (Reapportionment plan for Connecticut legislature having deviations of 3.93% above to 3.90% below in the House (total 7.83%) and .88% above to .93% below in the Senate (total 1.81%) disapproved.)

In re Legislative Districting of General Assembly, 193 N.W.2d 784 (Iowa 1972). (Reapportionment plan for Iowa legislature having total variance of 3.83% in House and 3.2% in Senate held invalid.)

Graves v. Barnes and related cases, Civil Action No.'s A-71-CA-142, 143, 144 and 145, F. Supp. (W.D. Texas 1972). (Reapportionment plan for Texas House of Representatives having deviations of 5.8% above to 4.1% below (total 9.9% rejected.)

Troxler v. St. John the Baptist Parish Police Jury, 331 F. Supp. 222 (E.D. La. 1971). (Reapportionment plan for local governing body having a total population variance of 6.2% rejected.)

In re Legislative Districting of General Assembly, 175 N.W.2d 20 (Iowa 1970). (Deviations of 7.3% above to 5.7% below in the House (total 13%) and 6.6% above to 5.5% below in the Senate (total 12.1%) disapproved.)

Driggers v. Gallion, 308 F. Supp. 632 (M. D. Ala. 1969). (Reapportionment plan for County Board of Commissioner districts held invalid where there was a 10% variance between smallest and largest districts.)

Skolnick v. Ill. State Electoral Board, 307 F. Supp. 698 (N.D. Ill. 1969). (Deviations of 8.6% above to 8.3% below in the House (total 16.9%) and 7.7% above to 7.0% below in the Senate (total 14.7%) held invalid.)

Long v. Docking, 282 F. Supp. 256 and 283 F. Supp. 539 (D. Kan. 1968). (Total variance between largest and smallest Senate districts of 16.6% held invalid.)

As indicated by these decisions, the state and lower federal courts have marched steadily in the direction of requiring equality of population among legislative districts, regardless of attempts made in the several cases to justify various deviations.

This is in keeping with the guideline laid down by this Court in *Roman v. Sincock*, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620 (1964), that "minor deviations only" from the principle of population equality can be justified. In that case, this Court said:

> Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, *with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.* 377 U.S. at 710 (emphasis supplied).

Quoted in *Swann v. Adams*, 385 U.S. 440, 444, 87 S. Ct. 569, 572, 17 L.Ed. 2d 501 (1967).

The deviations from population equality contained in the 1971 House of Delegates act (14% below to 9.6% above, total 23.6%) are manifestly not minor. Hence they cannot be justified and are constitutionally impermissible.

II

THE DEVIATIONS IN THE 1971 HOUSE OF DELEGATES REAPPORTIONMENT PLAN CANNOT BE JUSTIFIED ON THE GROUNDS OF AN EXISTING TRADITION TO PRESERVE THE INTEGRITY OF POLITICAL SUBDIVISIONS

The first Virginia reapportionment case, *Mann v. Davis*, 213 F. Supp. 577, came before a special three-judge court in the Eastern District of Virginia in 1962, some two years before the Supreme Court decided *Reynolds v. Sims, supra*. In rejecting the legislative reapportionment plan developed by the General Assembly the Court said:

> Plaintiffs here proved the inequity of the allotment of representatives on the basis of population. Thereupon the burden to adduce evidence of the presence of other factors which might explain this disproportion passed to the defendants. 213 F. Supp. at 584.

In affirming this decision (*Davis v. Mann*, 377 U.S. 678, 84 S. Ct. 1441, 12 L.Ed.2d 609 (1964)), the Supreme Court noted that the State had attempted to justify the mathematical inequity in its reapportionment on the ground of Virginia's then existing "tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines." 377 U.S. at 686. However, the Court found that the population variations between districts were too great to be justified by such an alleged custom.

In the case at bar, appellants again assert as a defense against appellees' claim of inequity in the allotment of legislators the same one put forward in *Davis v. Mann, supra*—namely, that the inequity is necessary to preserve Virginia's alleged tradition of respecting the integrity of

the boundaries of cities and counties in drawing district lines. But this defense is no longer available in the case of the Commonwealth for the reasons set forth below:

(1) In 1970 the voters of Virginia approved an amended State Constitution which contains the following significant provision (Article II, Section 6) dealing with the apportionment of electoral districts for both members of Congress and for members of the General Assembly:

> *Apportionment.* Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

Thus, there are not only no provisions in Virginia's Constitution requiring reapportionment plans to conform to county and city lines, but the new Constitution makes no distinction whatever between the standards for Congressional and legislative districts. Both must be composed of "contiguous and compact territory and . . . so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." It necessarily follows that the boundaries of political subdivisions must yield for legislative reapportionment as readily as for Congressional redistricting if this is necessary to carry out the constitutional mandate.

(2) As a result of a court challenge to Virginia's Congressional district plan, the General Assembly on March 11, 1972, adopted a new redistricting plan subsequently judicially approved and now in effect. Under this plan, the Assembly found it necessary to disregard the boundary lines of the Counties of Chesterfield, Fairfax and Stafford and the City of Virginia Beach in order to develop Congressional districts of approximately equal population (total deviation from the norm is less than 1%).[11]

(3) Twenty-five of the forty State Senatorial districts contained in the 1971 Senate reapportionment plan (A. 31-43) ignore county and city lines. Total deviation in the Senate plan is 9.7% (J.A. 56-62).

(4) The 1971 House of Delegates reapportionment plan divides Fairfax County in two parts (J.A. 28). Further, the Delegate reapportionment act Sepcifies (J.A. 30):

> Reference to a county or city herein shall, unless otherwise specifically provided, be construed to mean the territory comprising such county or city as it exists on the effective date of this enactment *notwithstanding future boundary changes by annexation, merger, consolidation or the voiding of boundary changes heretofore made final.* (Emphasis supplied).

Thus, the act clearly contemplates the division of counties and cities among House of Delegates districts either by reason of future annexations or otherwise, or by the voiding of boundaries changes.

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[11] *University of Virginia Newsletter*, Vol. 48, No. 11 of July 15, 1972, entitled "Congressional Redistricting in Virginia." Code Section 24.1-4.2.

For example, if the past annexation by the City of Richmond of a portion of Chesterfield County (now under review in the Federal courts) is reversed, the Thirty-third district with five Delegates will be composed of the City of Richmond and a part of Chesterfield County, and the Thirty-fifth "floater" district will also include a portion of Chesterfield County. Thus, the integrity of the boundary lines of Chesterfield will be disregarded.

Similarly, if in the annexation action involving the City of Petersburg against the Counties of Dinwiddie and Prince George, the annexation of a portion of the Counties ordered by a Virginia court (also now under review in the Federal courts) is reversed, the Thirtieth district[12] will be composed of Petersburg City and portions of said two Counties. Thus County lines will again be violated under the provisions of the 1971 House of Delegates redistricting plan. Conversely, several suits by Virginia cities to annex portions of adjacent counties are now in Virginia courts. If in any of these cases, a city is judicially permitted to annex a portion of any county, then the legislative district which is now defined by county lines would cross city lines to include a portion of the expanded city (i.e. that portion of the county which became part of the city by judicial decree).[13]

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[12]The Thirtieth district is described in the 1971 House of Delegates reapportionment act as follows: "Thirtieth.–Petersburg, including those portions of Prince George's and Dinwiddie Counties as described in the court's opinion in the annexation suit of Petersburg against the counties of Prince George's and Dinwiddie, one [delegate]" (J.A. 29).

[13]For a discussion of judicial annexation in Virginia, see *University of Virginia Newsletter*, Vol. 48, No. 9 of May 15, 1972 entitled "Municipal Annexation in Virginia 1960-1970."

(5) Appellants also intimate that the reapportionment statutes enacted by the General Assembly at the 1971 special session were the result of joint decisions mutually arrived at by Senate and House leaders to achieve a reapportionment "balance" by redistricting the upper House on a single member basis and the lower house on a largely multi-member basis.

Of course, this is not so. The Senate, which regularly sought the advice of the Attorney General of the Commonwealth in its redistricting considerations, independently arrived at a single member solution, with a disparity between the largest and smallest districts of 9.7%, and the House acquiesced. The House, which less frequently sought the advice of the State's Attorney General, independently produced a redistricting act heavily weighted towards multi-member districts and with an overall variance of over 23%—and the Senate acquiesced.

The reapportionment "balance" claimed by appellant Mahan *et al.* was not the result of careful overall planning—it just happened. Any balancing or compensation between the Senate and House reapportionment plans, if any such existed, was strictly a matter of accident.

In the light of all these developments, it can no longer be said that Virginia has an unbroken custom or tradition to maintain the integrity of political subdivisions in reapportionment which justifies the large population variations between House of Delegate seats in the General Assembly's 1971 Delegate plan. Under the circumstances, appellants cannot seriously rely on such a defense here.

Appellee can do no better at this point than to quote the following extract from the opinion of a three-judge court in *Long v. Docking, supra,* which struck down just such a defense in a Kansas reapportionment case:

> We do not insist that the "one man, one vote" doctrine contemplates that a state legislative body shall apportion the state senatorial districts so that all such districts must be *exactly* equal in population. But . . . where "county lines were ignored in a sufficient number of instances to such an extent that the plan or pattern manifested an intention to disregard them," then under a plan of reapportionment which ignores political subdivision lines, it is not permissible to deviate from the equal population *principle* in either or both houses of a State Legislature. 282 F. Supp. 258.

III

THE 1971 HOUSE OF DELEGATES REAPPORTIONMENT PLAN WAS UNCONSTITUTIONAL BECAUSE IT DISCRIMINATED AGAINST NORTHERN VIRGINIA AND CONVERSELY CONTAINED A BUILT-IN BIAS FAVORING OTHER AREAS OF THE STATE, PARTICULARLY THE TIDEWATER AREA

As stated earlier, almost every House seat in Northern Virginia was under-represented. Alexandria's seats (Twenty-first district, two seats, plus the Alexandria share of the Twenty-third floater district, .39 of a seat, total, the equivalent of 2.39 seats) were close to optimum population, being over-represented by 0.1% (J.A. 10). Except for these seats, all House seats in Northern Virginia were under-represented from 3.9% to 6.3%. Including Alexandria, each House seat in Northern

Virginia was under-represented an average of more than 4.3% per seat (A. 39-40; J.A. 10, footnote).

The Northern Virginia Counties and Cities had a total population of 921,237 persons, according to the final 1970 census figures, which figure was 19.82% of the Commonwealth's total population of 4,648,494. However, under the 1971 House reapportionment act, Northern Virginia jurisdictions were allotted among them only nineteen House seats or 19% of a total of one hundred, although under the 1971 Senate reapportionment act they were allotted eight Senate seats or a full 20% of a total of forty, and under the 1971 Congressional reapportionment act (Code Section 24.1-4.1) they were allotted two Congressional seats or a full 20% of a total of ten (A. 75). (They also received two congressional seats under the 1972 act, Code Section 24.1-4.2.)

These instances of invidious discrimination were and are particularly unfair and discriminatory in that Northern Virginia Counties and Cities as an area comprise the fastest growing region in the Commonwealth by far. During the 1960-1970 decade Northern Virginia grew at an average annual rate of 4.4% as compared with a State-wide average of 1.6%. Average annual growth rates varied from .06% for the City of Falls Church (population 10,772) to 4.2% for Loudoun County (37,150), 6.2% for Fairfax County (455,021), and 8.3% for Prince William County (111, 102) (A. 67, p. 2).

In contrast, a majority of the House districts in the Tidewater area and most of the jurisdictions therein with a majority of the population were over-represented. In particular, the City of Norfolk, with a population of 307,951, was given seven House seats (Thirty-ninth district), each of which had a population of 43,933; thus

the Norfolk district and each of such seven seats were over-represented by 5.4%.

The City of Chesapeake, with a population of 89,580 was given two House seats (Thirty-eighth district) each of which had a population of 44,790. Thus, the Chesapeake district and each of such districts were over-represented by 3.6%. In addition, Chesapeake shared with Virginia Beach and Portsmouth a "floater" House seat (Forty-second district). The weighted value of the Chesapeake "floater" district was 24% of a full House seat (i.e. the proportion that the Chesapeake population of 89,580 bore to the total floater district population of Chesapeake, Virginia Beach and Portsmouth of 372,649). Since under the legislative redistricting plan Chesapeake was accorded the equivalent of 2.24 House of Delegate seats, the population per seat was 39,991, and Chesapeake was over-represented by 14%.

The seat awarded Nansemond and Suffolk with a total population of 45,024 was over-represented by 3.2%, while the House seat awarded to Southampton, Franklin City and Isle of Wight with a total population of 43,747 was over-represented by 5.9% (A. 43; J.A. 29-30; J.A. 4, footnote; cf. A. 81-83).

During the decade 1960-1970 the average annual growth rate for all of the jurisdictions in the Tidewater area was only 1.4% or less than one-third of the average annual growth rate (4.4%) of all Northern Virginia jurisdictions. For the 1970-80 decade the average annual growth rate for all of the Tidewater jurisdictions is estimated by the Commonwealth to be 1.3%, or less than half the estimated average annual growth rate for all Northern Virginia jurisdictions of 3.1% (A. 67, pp. 2, 4).

In *Abate v. Mundt, supra,* The Supreme Court said:

> Of course, this Court has never suggested that certain geographic areas or political interests are

> entitled to disproportionate representation. . . . Accordingly, we have underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests, or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors, see *Hadley v. Junior College District*, 397 U.S. 50, 57-58, 90 S. Ct. 791, 795-796, 25 L.Ed. 2d. 45 (1970). 403 U.S. at 185-6.

Appellee insists that the 1971 House of Delegates reapportionment act falls within the proscription of *Abate v. Mundt*—since it is an apportionment structure which clearly discriminates against one geographic area, Northern Virginia, and conversely has a "built-in bias" favoring other geographic areas of the Commonwealth of Virginia, particularly the Tidewater.

In this connection, the opinion of the District Court found "pervasive under-representation in districts in Northern Virginia, and over-representation in Tidewater" (J.A. 18). The court said (J.A. 17-18):

> Previously, we have alluded to the difficulty of equalizing districts when there is an over-represented group and there is no adjacent district which is under-represented. Examination of the delegate plan just outlined will reveal that this situation is sharply manifest in the Legislature's plan in districts 39, 43 and 44—City of Norfolk and Nansemond, Southampton and Isle of Wight counties—located in the Tidewater area. They are characterized by under-population of 4.8% and thus over-represented. Districts 18, 19 and 20 are a group in Northern Virginia non-contiguous to the under-populated districts of Tidewater. They are beset with an over-population with an average of 5.4%.

Actually, this is the apple of discord between the parties plaintiff in *DuVal-Parris* and the defendants

who are upholding the current legislation. The only solution is the transfer of a delegate from Tidewater to Northern Virginia, and it must be ordered. This is the only instance in which a delegate is transferred from one sector of the State to another. It is justified by the pervasive under-representation in districts in Northern Virginia, and over-representation in Tidewater, as earlier explained.

The 1971 House of Delegates reapportionment act is invalid because, as determined by the lower Court, it contains built-in discrimination against the geographic area of Northern Virginia and, correspondingly, a built-in bias in favor of other areas of Virginia, particularly the Tidewater area.

IV

THE DISTRICT COURT WAS FULLY JUSTIFIED IN DISCARDING THE 1971 HOUSE OF DELEGATES REAPPORTIONMENT PLAN AND PREPARING ITS OWN PLAN

Appellee submits that the decision of the lower Court to judicially apportion the General Assembly, as set forth in its opinion and order of July 2, 1971, rested on sound considerations.

The General Assembly first met in special session on reapportionment on January 6, 1971. Its statute reapportioning the House of Delegates was approved March 1, 1971, and was promptly attacked through the suit filed by appellee DuVal and other Northern Virginia plaintiffs on March 5, 1971. Four times thereafter the General Assembly reconvened its special session on reapportionment, but on each occasion declined to change its unconstitutional House of Delegates reapportionment

plan, despite repeated warnings by appellee DuVal, then a State Delegate, and other legislators, of its invalidity and despite the pending court actions against the plan. Despite these warnings, the General Assembly—and specifically the House of Delegates, which, as already pointed out, actually made all of the decisions regarding the provisions of the lower house redistricting plan—adamantly clung to its invalid reapportionment scheme.

Further, time was of the essence, since Virginia primary elections had already been postponed by order of the lower Court (J.A. 43-45) from June 8 to September 14, 1971. Thus, on July 2, 1971 these elections were only some ten weeks away. Candidates for the General Assembly running from revised districts in the primary elections were required by the State's Election Law (Va. Code 24.1-184), as interpreted by an opinion of the Virginia Attorney General, to file not later than sixty days prior to the new primary date, to wit, by July 16, 1971. A contraction of the filing period or further postponement of the primary election would have been chaotic for candidates and would have prevented any semblance of an orderly election process in Virginia during the Fall of 1971.

In other words, the District Court simply did not have time to refer the unconstitutional redistricting plan back to a stubbornly resisting General Assembly, subsequently review whatever action the Assembly might take, correct the new plan as necessary, and order it into effect—at least without seriously interfering with Virginia's election processes.

In *Reynolds v. Sims, supra,* the Supreme Court noted that "We do not consider here the difficult question of the proper remedial devices which Federal courts should

utilize in state legislative apportionment cases." 377 U.S. at 585. However, the Court indicated that lower courts would have wide latitude in developing "remedial techniques," and that these "... will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions" (585).

In a further comment particularly appropriate to the present case, the Court said:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. 377 U.S. at 585.

This the lower court proceeded to do. It transferred one Delegate seat from the Tidewater area to Northern Virginia, thus eliminating one of the principal vices of the legislature's House of Delegates reapportionment plan, i.e., the built-in discrimination against Northern Virginia and the built-in bias in favor of Tidewater.

In so acting, the District Court utilized well-documented findings as to population trends throughout Virginia, in the form of an official State document making population projections for the Commonwealth over coming decades (A. 67). This the lower court was certainly entitled to do.

In *Davis v. Mann, supra,* this Court indicated that growth rates are valid considerations. See footnote 4 to this Court's opinion in that case (377 U.S. at 688), where the Court noted with apparent approval plaintiff-appellees' contention that under-representation of rapidly growing areas would worsen significantly over the period before the next reapportionment.

In *Kilgarlin v. Hill, supra,* this Court approved the temporary over-representation of one legislative district as compared with another district because the population of the first district was "growing rapidly." This Court said there:

> Appellants complain that district 24 in Harris County is assigned only six representatives whereas district 22 in the same county with a slightly smaller population is assigned seven representatives. The court found the record to establish that the population in district 22 was growing rapidly as compared with district 24 and would soon justify the extra representative. This factual determination not being challenged here, we accept the ruling of the District Court regarding these districts. 386 U.S. at 125-126.

More recently, this Court said in *Kirkpatrick v. Preisler, supra*:

> Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, states that are redistricting may properly consider them. 394 U.S. at 535.

Population growth in Northern Virginia is so dynamic that if the lower court had not given the region a twentieth Delegate seat, official State estimates indicate that each of the nineteen Delegate seats allocated to Northern Virginia under the General Assembly's plan would as of August 1, 1972, already be under-represented by about 12% per seat, assuming the population norm per Delegate seat continued to be 46,485 persons. On the same basis, even with the twenty seats allocated by the District Court, it is estimated that each Delegate seat in Northern Virginia is under-represented as of the same

date by about 6% per seat. In fact, the estimated August 1, 1972 population of Northern Virginia of some 985,000 persons would entitle it to representation by twenty-one Delegates representing 46,485 persons per seat.[14]

In addition to correcting the discrimination against Northern Virginia built into the General Assembly's House of Delegates redistricting plan, the District Court also acted to eliminate or greatly reduce other significant population inequalities manifest in the legislature's plan.

The lower court did this in a reasonable way, seeking to continue in effect the General Assembly's House of Delegates plan to the extent constitutionally practicable. Unconstitutional deviations from the population norm among the various Delegate districts were corrected by adding or subtracting population units, utilizing for such units existing political subdivisions or descriptions provided by the United States Census Bureau. This necessitated a disregard for political subdivision lines in the case of twelve counties and cities out of a total in all of Virginia of one hundred thirty-four. As stated by the District Court (J.A. 4-5):

> These unconstitutional disparities can be remedied in most instances by merely shifting district lines, leaving undisturbed the numerical allocation of delegates to districts. It is an adequate remedy whenever mal-apportionment arises from over-population in a district which is contiguous to one or more under-populated districts. We have

[14] See A. 67, p. 2, which projects on average annual growth rate for Northern Virginia of 3.1%. Assuming that the 1970 Census figure for Northern Virginia of 921,237 persons was final as of May 1, 1970, the population of Northern Virginia on August 1, 1972, would project at some 985,820 persons.

endeavored to pursue this adjustment wherever feasible because it fosters the clear preference of the Assembly to adopt recognized political subdivision lines in apportioning delegates.

* * * * *

The source of every change is either existing political subdivisions or the descriptions provided by Enumeration Districts (ED), Block Groups (BG) or Census Tracts (CT) provided by the United States Bureau of the Census for 1970.

The District Court's redistricting plan for the House of Delegates was not only reasonable but also equitable in that it significantly reduced the dilution or debasement of Virginians' right to vote inherent in the General Assembly's reapportionment plan.

Excluding the Accomack County-Northampton County seat (Forty-sixth district), the range in the Court's plan between largest and smallest districts is but 7.2%. Including the Forty-sixth (over-represented in the Court plan by 6.5% because the two counties are isolated by Chesapeake Bay from the rest of Virginia) the range is 10.3% (J.A. 21-22). Since the variation between largest and smallest district in the Assembly plan was 23.6% (J.A. 4), it is evident that the Court's plan took a huge step towards the goal of insuring that the vote of every Virginian in any State election counts as much as that of any other resident of the Commonwealth.

It is, of course, people who vote—not land or trees or pastures or political subdivisions (*Reynolds, supra,* 377 U.S. at 580-581). And for all electoral districts, congressional, state or local, the basic principle of population equality equally applies.

As stated by the Supreme Court in *Hadley v. Junior College District,* 397 U.S. 50, 54, 90 S.Ct. 791, 794, 25 L.Ed. 2d 45 (1970):

> This Court has consistently held in a long series of cases that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement.

Appellee submits that the lower court was required to reject the 1971 House of Delegates statute as unconstitutional under rulings of this Court most recently reiterated in *Abate v. Mundt, supra*; further, that since time was of the essence The District Court had no alternative but to prepare its own plan; and finally that the lower court's plan is reasonable and meets all constitutional tests laid down by this Court.

V

EVEN IF, ARGUENDO, THE INTERLOCUTORY ORDER OF THE DISTRICT COURT WAS ISSUED PRECIPITOUSLY OR WENT TOO FAR, THE LOWER COURT'S HOUSE OF DELEGATES REAPPORTIONMENT PLAN SHOULD NOT BE DISTURBED AT THIS STAGE, SINCE THE ACTION OF THE LOWER COURT IS NOT FINAL AND ANY INVALIDATION OF ITS PLAN WOULD OUST THE ONLY LEGISLATURE VIRGINIA NOW HAS

As pointed out earlier, elections to the Virginia General Assembly were held on November 9, 1971, under the District Court's plan. Legislators were elected to both Houses, and the Assembly as thus reconstituted conducted the State's legislative affairs and enacted laws governing Virginia at the regular session held January-March, 1972.

At the present time, the General Assembly elected under the lower court's plan is the only legislature the Commonwealth has. If this Court were to grant appellants' primary request to affirm the validity of 1971 reapportionment plans adopted by the Virginia legislature and declare unconstitutional the District Court's plans, the result would be to oust many present members of the Assembly.

Such an attempt to unscramble the eggs could accomplish no useful purpose and would create a legislative vacuum in Virginia. It would be costly to the taxpayers of the Commonwealth, confusing to voters, difficult for legislative candidates, and surely not in the best interest of the people of Virginia.

In *Connor v. Williams, supra,* a somewhat similar situation confronted this Court. Elections had been held for the Mississippi legislature under a plan fashioned by the District Court. Under the lower court's plan there was a total variance between the populations of the largest and smallest districts of 18.9% as to Senate districts and 19.7% as to House districts. The Supreme Court said that this raised "substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment." 92 S.Ct. at 658.

However, the Supreme Court noted that the District Court had retained jurisdiction to conduct hearings as to certain multi-member House districts. Under these circumstances, this Court declined to disturb the elections held under the District Court's plan, stating:

> Pending completion of those proceedings [in the lower court], we deem it inappropriate to give further consideration to this case. If we are to consider the applicability of *Preisler* and *Wells* to

> state legislative districts, it would be preferable to have before us a final judgment with respect to the entire State. 92 S.Ct. at 658.

As in *Connors v. Williams,* here too the lower court has retained jurisdiction of the matter, and the instant appeals are from an interlocutory order.

At the past 1972 Session of the General Assembly, the Virginia legislature, if it had so desired, could have enacted a new redistricting plan for either or both Houses of the legislature. In such a plan, the legislature could have amended the lower Court's plan in any way it saw fit so long as constitutional requirements were met. As pointed out in *Connor v. Williams, supra,* in footnote 4 of this Court's opinion:

> Meanwhile, it is possible that the state legislature will adopt a plan of its own. During the course of this litigation, the District Court has emphasized that "the exercise of this unavoidable judicial duty [drafting an apportionment plan] cannot, *does not, and will not in any way tie the hands of the Legislature at any time* to adopt and enact any plan of its own for the reapportionment of its membership so long as it complies with Constitutional requirements." *Connor v. Johnson*, 265 F. Supp. 492, 494 (S.D. Miss. 1967) (emphasis in original). 92 S.Ct. at 658.

However, the General Assembly did not elect to do so. Specifically, the House of Delegates did not even consider, much less enact any change or amendment of the District Court's Delegate plan.

The option of adopting new redistricting legislation still remains open to the General Assembly at either a

special session[15] or at the regular session to be convened in January, 1973. Since a new House of Delegates will not be elected until November, 1973, and a new Senate will not be elected until November 1975, the General Assembly could if it so desired, at either a special session or the 1973 regular session, enact new reapportionment legislation without any disruption of Virginia's election process. For example, if the Assembly so elects, such new statute could modify those aspects of the lower court's plans complained of by appellant City of Virginia Beach which specifically relate to the legislative representation of that municipality.

If the Assembly does enact new reapportionment legislation for the House of Delegates, such act could, of course, and presumably would be submitted for review to the District Court, which has retained jurisdiction herein. If the General Assembly's new plan is then approved or modified by the District Court and appeals are again taken to this Court, the situation deemed desirable by this Court in *Connor v. Williams, supra,* would in fact exist—i.e. this Court would have before it "a final judgment with respect to the entire State" (92 S.Ct. at 658), a situation that does not now exist. There would be time enough then for this Court to consider whatever the final reapportionment structure for Virginia turns out to be and to take whatever action is then appropriate.

If, on the other hand, the General Assembly fails to enact a new redistricting statute for the House of

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[15]Under Article IV, Section 6 of the Constitution of Virginia, the Governor must "Convene a special session upon the application of two-thirds of the members elected to each house," or he "may convene a special session of the General Assembly when, in his opinion, the interest of the Commonwealth may require . . ."

Delegates, the Assembly's continued inaction would demonstrate that it no longer has objection to the lower court's plan.

Failure of the General Assembly to even consider new reapportionment legislation at the 1972 session would indicate that the House of Delegates, which in 1971 specifically requested the Virginia Attorney General to seek reversal of the District Court's reapportionment plan by an appeal to this Court, has now changed its collective mind and is content to abide by the District Court's plan.

As a practical matter and under all the circumstances here present, appellee submits that it is unnecessary and highly undesirable for the Supreme Court to give further consideration to this case at this stage.

CONCLUSION

For the reasons set forth above, appellee respectfully requests this Court to affirm the decision of the lower court as reflected in the interlocutory order of the United States District Court for the Eastern District of Virginia entered on July 2, 1971, to the extent that such order declared invalid the 1971 House of Delegates reapportionment act and reapportioned the Virginia House of Delegates. (This appellee takes no position on the portion of such order modifying the 1971 Senate reapportionment act). In the alternative, appellee respectfully

requests this Court to dismiss the appeals in their present stage without prejudice.

Respectfully submitted,

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IN THE

Supreme Court of the United States

71-374

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

STANFORD E. PARRIS, ET AL.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

CLIVE L. DuVAL, *II*, ET AL.,

Appellees.

On Direct Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR THE APPELLEE, CITY OF NORFOLK
QUESTIONS PRESENTED

I. Whether a state legislative plan is valid in which one chamber of a bicameral legislature is designed to keep political subdivisions intact, while the other chamber is designed to achieve representation by "mathematical exactness"?

II. Assuming the test for validity of state legislative reapportionment is "mathematical exactness" in both houses of a bicameral state legislature, does a political subdivision have status to object that its residents were co-mingled with residents from an abutting political subdivision?

III. Whether the District Court gave all parties an opportunity to be heard?

IV. Whether the City of Virginia Beach has status to object to the District Court's reapportionment plan?

STATEMENT OF THE CASE

The City of Norfolk intervened in the three cases advocating the validity of the General Assembly of Virginia's reapportionment plan for two reasons: (1) To maintain the integrity of the 1970 United States Census Bureau's Decennial Population Enumeration as a basis for state reapportionment; and (2) To defend the constitutionality of said reapportionment plan. (P. 46 of Vol. I of Record of *Prichard, et al* v. *DuVal, II,* et al; P. 43 of Vol. I of Record of *Prichard, et al* v. *Parris;* and P. 73 of Vol. I of *Mahan, et al* v. *Howell, et al.)*

The General Assembly of Virginia consists of two legislative chambers, the Senate and the House of Delegates. (Section 2 & 3 of Article IV of the Virginia Constitution of 1971.)

Under its reapportionment plan, one chamber of its bicameral legislature was to have forty (40) equal single member elective districts. (Joint Appendix, Pp. 31-43.)[1]

The other chamber, the House of Delegates, was to have one hundred (100) delegates made up of fifty-two election districts consisting of single member, multimember and floater districts. (Joint Appendix, P. 29.) It is uncontradicted that the House scheme pursuant to State tradition and policy is as close to the optimum percentage deviation of perfect equality that election districts could be devised, while maintaining the integrity of traditional boundary lines of political subdivisions. (Stipulation of James M. Thompson, P. 92 of Vol. I of Record in *Parris, et al* v. *Prichard, et al;* P. 123 of Vol. I of Record of *Du-Val, et al* v. *Prichard, et al.)*

In the legislature's reapportionment scheme, the City of Norfolk was delineated seven (7) delegates. (39th District, Joint Appendix, P. 29.) Although it was underrepresented (5.4%), the integrity of the City of Norfolk's boundary line was maintained.

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[1]Two appendixes appear in this cause: One entitled "Joint Appendix of the City of Virginia Beach and Virginia State Board of Education – Joan S. Mahan, et al", to be hereinafter referred to as "Joint Appendix"; and a second appendix hereinafter to be referred to as "Appendix."

The District Court's reapportionment plan for the House also assigned seven (7) delegates to the 39th election district. However, the 39th District consisted of 307,951 residents of the City of Norfolk and 29,136 residents of the City of Virginia Beach. (Joint Appendix, P. 14.) In addition, the District Court's plan co-mingled residents of other political subdivisions, disregarding political subdivsion boundary lines. (Joint Appendix, Pp. 1-25.)

The co-mingling of residents of political subdivisions was apparently done by the District Court to meet the

constitutional test that all reapportionment plans, congressional, state and local, must be adopted in "a good faith effort to achieve mathematical exactness". *Wesberry* v. *Sanders,* 376 U.S. 1 (1964) and *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969).

Whether "mathematical exactness" is the test for federal, state and local reapportionment plans, it is assumed, is the issue to which this Court granted probable jurisdiction. *Connor* v. *Williams,* U.S. , 30 L. Ed. 2d 704, 706 (1972).

Although it was not damaged by the District Court's Opinion and Order dated July 2, 1971, the City of Norfolk submits to this Court that representatives elected from within traditional boundary lines of political subdivisions in one chamber of a state bicameral legislature, as advocated by the Attorney General of Virginia and City of Virginia, are more important than numbers alone, which result from representation measured by "mathematical exactness".

ARGUMENT

I.

A STATE REAPPORTIONMENT PLAN CONSISTING OF A BICAMERAL LEGISLATURE IN WHICH ONE CHAMBER HAS ELECTION DISTRICTS DESIGNED BY "MATHEMATICAL EXACTNESS" AND THE OTHER CHAMBER RETAINS TRADITIONAL POLITICAL SUBDIVISION BOUNDARY LINES IS A VALID CONSTITUTIONAL PLAN.

Both the Attorney General of Virginia and the City of Virginia Beach have persuasively briefed the law and merits of the issue concerning the maintenance of traditional boundary lines of political subdivisions in one chamber of a bicameral legislature. It is not the City of

Norfolk's intention to repeat these arguments.

However, it is important for this Court to understand that interests of abutting political subdivisions can be adverse.

To illustrate these adverse interests, the City of Norfolk will attempt to be candid with the Court as well as fair to the City of Virginia Beach in setting forth some adverse interests between the two cities.

A description of the two cities shows a remarkable difference in itself. Norfolk is an old seaport city, the location of one of the largest naval bases in the world. Norfolk is essentially urban and the commercial center of Tidewater, Virginia. It is fronted on three sides by water and abuts the boundaries of the municipalities of Virginia Beach and Chesapeake.

The City of Virginia Beach is a relatively new municipal corporation which can be described as "suburbia". It has been said that Virginia Beach is the bedroom of the white middle to upper economic classes who are employed in Norfolk. (Virginia Beach may not agree to this description.) Virginia Beach is also a summer resort center as well as the site of military bases.

The City of Norfolk has the same financial problems as other urban centers. Its boundaries are fixed, with no prospect of outward growth. It must rely presently upon regressive real estate taxes, in addition to license taxes, for its principal revenue. As much as fifty percent of its land is exempted from taxation by federal and state law.

To combat the lack of revenue channels, Norfolk has actively solicited authorization of the General Assembly for a local occupation or piggy-back income tax.

Needless to say, the bedroom communities of Norfolk have been unified in opposition to such an occupation tax.

Another adverse interest centers upon Norfolk's owning a very sophisticated water collection and distribution system, valued at from fifty to one hundred million dollars, depending on various consultants' opinions.

Virginia Beach, over the years, has negotiated with Norfolk for purchasing water. Much controversy has existed over the price differential charged residents of Norfolk and Virginia Beach.

Virginia Beach would like to have utilities furnished by municipal corporations regulated by the Virginia State Corporation Commission, while Norfolk is for the *status quo*.

Norfolk, being landlocked, has redeveloped much of its older slum sections. Its concern is the use of these redeveloped lands.

In turn, Virginia Beach is concerned with planning the land use of rural areas. While Virginia Beach is growing spectacularly, it has difficulty meeting the increased demand for services, such as schools, sewers, fire protection and police.

As indicated, Virginia Beach's residents are the middle and upper classes, while Norfolk is concerned with its increasing welfare rolls.

Finally, the most recent adverse interest is concerned with the issue of merging school districts by court order for the purpose of integrating predominantly black urban school systems with predominantly white suburban school systems.

As this Court knows, The School Board of the City of Norfolk, Virginia, has been involved with litigation for fifteen years over the issue of integration of its school system. (Civil Action No. 2214, In the United States District Court for the Eastern District of Virginia, Norfolk Division — Leola Pearl Beckett, et al, Plaintiffs, and

Carlotta Mozelle Brewer, et al, and United States of America, Plaintiff-Intervenors, v. The School Board of City of Norfolk, Virginia, et al, Defendants, and David E. Allgood, et al, Defendant-Intervenors.)

The threat now facing the school system is resegregation. Over 7,000 white students have departed from the City of Norfolk school system since massive busing was ordered by the courts.

This matter is pointed up only to illustrate that favorable discussions concerning the merger issue have been made in Norfolk, while unfavorable discussions, bordering on hysteria, have resulted in Virginia Beach.

The different interests illustrated are meant to emphasize to this Court that the present structure of state and local government in Virginia consists of separate political subdivisions. Even abutting municipal corporations have many adverse political, social and economic interests which should be represented separately in at least one chamber of a bicameral state legislature.

Today Norfolk stands before you not damaged by the District Court's Order. However, politics are never stationary and tomorrow it may well be the City of Norfolk which has lost its identity in the state legislature.

"Mathematical exactness" should not be the sole test of the Virginia legislative reapportionment plan designed in good faith by the General Assembly to represent the residents of Virginia.

II.

ASSUMING "MATHEMATICAL EXACTNESS" TO BE THE TEST REQUIRED HEREIN, NO POLITICAL SUBDIVISION SHOULD HAVE STATUS TO OBJECT TO ITS RESIDENTS BEING CO-MINGLED WITH RESIDENTS OF OTHER POLITICAL SUBDIVISION.

Although the City of Norfolk strongly advocates that "mathematical exactness" is not the constitutional test in this case, it submits that, if it is, no political subdivision should have status to object to a state reapportionment scheme.

The City of Virginia Beach argues that it is discriminated against under the District Court's plan because its residents have been co-mingled with residents from other political subdivisions. Specifically, it objects to 29,136 of its residents being co-mingled in House of Delegates election district 39 (Joint Appendix, P. 14), a multimember district of seven delegates of which 307,451 persons are residents of the City of Norfolk.

In addition, the City of Virginia Beach cites that 40,195 of its residents vote in a multimember senate district, with 307,951 residents of the City of Norfolk.

As a result, Virginia Beach argues it has no identity in either legislative chamber under the District Court's plan.

As previously noted, the City of Norfolk is sympathetic to the City of Virginia Beach's claim that in the state legislature it has lost its representative identity.

However, also as previously noted, the District Court was of the opinion that the law requires the constitutionality of state legislative reapportionment plans to be tested by the standard of "mathematical exactness". *Wesberry* v. *Sanders,* 376 U.S. 1 (1964) and *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969).

It is believed that there is no controversy to the fact that political subdivisions are not created upon the principle of their population being equal. Political subdivisions are designated specific boundary lines in their charters, usually based upon traditional and geographical boundaries.

Therefore, assuming the District Court was correct in using the "mathematical exactness" test, no single political subdivision should have status to object that residents within its boundary lines were co-mingled with residents of another political subdivision.

"Mathematical exactness" is not a geographical or political interest measuring device, but pertains only to equality of numbers in election districts. In what political subdivision a person lives is not relevant.

In addition, it is not disputed that both the General Assembly's and the District Court's reapportionment schemes were based upon the United States Census Bureau's Population Enumeration. In devising election districts that are mathematically exact, the computation and designation of census tracts (numbers of persons) involve much discretion. No political subdivision should have status to object to this discretion.

Finally, to sustain a political subdivision's charge that it has been discriminated against when its residents have been co-mingled with residents of another political subdivision would lead to utter chaos in the dockets of the district courts. Constitutional challenges from political subdivisions would arise after each legislative reapportionment.

Accordingly, although the City of Norfolk has advocated herein that "mathematical exactness" should not be the test to be applied to state reapportionment plans, if it is, the City of Virginia Beach should not be given status to object to the fact that residents of Virginia Beach and Norfolk were co-mingled in one election district.

III.

ALL PARTIES WERE GIVEN AN OPPORTUNITY TO PRESENT THEIR CASE TO THE DISTRICT COURT.

Assuming once more that the District Court was correct in ruling the Virginia legislative reapportionment plan to be invalid, what were the alternative remedies available to the District Court?

A.

Certainly it is well settled that the District Court could have ruled the plans to be invalid, and if the legislature had not failed to meet its constitutional obligations and time was not of the essence, the District Court could have returned the plan back to the legislature. *Ely* v. *Klahr,* 403 U.S. 108, 114 n. 6 (1971); *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964).

B.

Additionally, the District Court could have announced minimum percentage guidelines upon which the legislature could proceed to devise a plan, but this would have been an advisory opinion. This Court and most other courts refuse to render advisory opinions. *Roth* v. *Delano,* 338 U.S. 226 (1949); 20 Am. Jur. 2d (Counts Sec. 75) at Pp. 437-438.

In addition to the Court's reluctance to render advisory opinions, the parties to this case in the District Court were mostly members of the legislature who had been unable or unwilling to devise a plan that all parties agreed was valid.

The district judge in the case of *Bussie* v. *Governor of Louisiana,* 333 F. Supp. 452 (1971), District Court sustained by the 5th Circuit on September 14, 1972, said at page 461:

> "Secondly, the very parties who appear to be the primary parties at interest in these suits, . . . , all had an active part in the abortive attempt of the legislature to reapportion itself in 1971. For this court to have assumed for one

moment that these parties could suddenly get together and come up with an acceptable plan . . . , would have been presumptious indeed . . . ."

C.

Finally, the District Court could have devised a plan of its own, which in fact it did.

The appellants, however, assert that the Court abused its discretion by devising its own plan.

First it should be pointed out that the plan adopted by the District Court had been devised by the Privileges and Elections Subcommittee for the purpose of having a plan where all election districts were below a five percent deviation from the optimum. The plan was given to the District Court by the Chairman of said Committee, James M. Thompson, an intervenor herein in the District Court. The full Committee did not adopt the plan and it died in Committee.

Secondly, although the issue at the trial was reapportionment, and knowing full well that this same District Court had previously revised an invalid Virginia reapportionment plan itself (*Davis* v. *Mann,* 213 F. Supp. 577, affirmed 377 U.S. 678 (1964)), no party other than the Chairman of the Privileges and Elections Committee submitted any alternative plans to the District Court. Certainly, if other plans had been submitted the District Court would have considered them.

IV.

THE CITY OF VIRGINIA BEACH HAS NO STATUS TO OBJECT TO THE DISTRICT COURT'S REAPPORTIONMENT PLAN

As was vividly pointed out in the District Court's Order dated July 13, 1971, denying the City of Virginia Beach's Motion for a stay of the District Court's Order dated July 2, 1971, the City of Virginia Beach did not

intervene, argue, brief or attempt to raise the issue of reapportionment until after the District Court's Order was filed on July 2, 1971. (Joint Appendix, at pages 26 and 27.)

This Court has consistently ruled that it will not hear on appeal a party on an issue it did not raise in the lower court. *California* v. *Taylor,* 353 U.S. 553, 556-557, no. 2 & 3 (1957); *Neely* v. *Eby Construction Co.,* 386 U.S. 317, 330 (1967).

CONCLUSION

The structure of government in Virginia logically dictates the necessity of political subdivisions having representative identity in one house of a bicameral legislature. Even abutting municipal corporations have adverse interests that cannot be represented by the same legislator.

If the constitutional test for state legislative reapportionment plans is "mathematical exactness", the District Court's plan is valid.

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CERTIFICATE OF SERVICE

I, Gordon B. Tayloe, Jr., counsel for the Appellee,

City of Norfolk, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief for the Appellee, City of Norfolk, in the United States Mails, first class postage prepaid, this 14th day of August, 1972, addressed to:

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FILE COPY

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Supreme Court of the United States

October Term, 1972

No. 71-564

JOHN S. MAHAN, SECRETARY,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia

REPLY BRIEF ON BEHALF OF APPELLANTS

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Supreme Court of the United States

October Term, 1971

No. 71-364

JOAN S. MAHAN, SECRETARY,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,
v.
HENRY E. HOWELL, JR., ET AL.,
Appellees.

EDGAR A. PRICHARD, MEMBER,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,
v.
CLIVE L. DUVAL, 2D. ET AL.,
Appellees.

EDGAR A. PRICHARD, MEMBER,
STATE BOARD OF ELECTIONS, ET AL.,
Appellants,
v.
STANFORD E. PARRIS, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

REPLY BRIEF ON BEHALF OF APPELLANTS

PRELIMINARY STATEMENT

We respond here to appellees' arguments on the three issues now before this Court: (1) appellee DuVal's conten-

tion that "one man, one vote" principles preclude Virginia's determination that one house of its legislature (the House of Delegates) should give representation to political subdivisions; (2) appellee Howell's contention that Virginia is not permitted to apportion the other house (the Senate) on the basis of the decennial Census; and (3) the question whether—even assuming some malapportionment—the court below erred in decreeing its own apportionment plan rather than allowing the Virginia General Assembly a reasonable opportunity to reformulate its plan. There is no longer any issue before this Court concerning the Voting Rights Act.[1]

ARGUMENT

1.

Arithmetic Is Not The Sole Determinant Of The Propriety Of The Plan For The House Of Delegates.

Appellee DuVal argues simplistically that the House of Delegates is malapportioned because it involves percentage deviations from district to district that are greater than those involved in a number of lower court cases where re-

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[1] The Voting Rights Act appeal originally consolidated with the present case (*Thornton* v. *Prichard*, No. 71-553) was dismissed on appellant Thornton's own motion after our opening brief had been filed. Although Thornton has filed a brief as an appellee in which he refers to the Voting Rights Act, he concedes (Thornton Br. 3) that no such issue is now before the Court. Accordingly, the Court need not consider pages 60-74 of our opening brief and we have no occasion to discuss Thornton's position further, except to note the inaccuracy of his suggestion that the court below has not entered an appealable final judgment. Thornton himself gave the point away in his Jurisdictional Statement (p. 10) where he states that the district court "retained jurisdiction to enforce its order, but in all other respects the order, although called 'interlocutory' was in effect, final." *See, Angel* v. *Bullington*, 330 U.S. 183, 189 (1947).

apportionment plans have been disapproved. He refuses to give any weight to the Commonwealth's considered decision that this one house of its bicameral legislature should afford representation to existing political subdivisions, or to the finding below that the House plan comes as close to population equality as is possible "if the integrity of political subdivisions is mandated." (J. App. 5.)

DuVal's "numbers game" would reduce to absurdity this Court's statement that the basic principle of legislative apportionment is "fair and effective representation for all citizens." *Reynolds* v. *Sims,* 377 U.S. 533, 565 (1964). It would deny the States any significant choice concerning the form of their own legislative systems. When, as here, the issue relates only to one house of a State legislature and the other house is characterized by nearly exact population equality through the use of single-member districts, we submit that the determination must be based on the answers to two somewhat more subtle questions: (1) Is the apportionment of the house in question based on a permissible rationale? (2) Does the plan approach population equality as closely as possible in consistency with that rationale?

The answer to the last question is unquestionably affirmative in this case, and the district court so found. (See J. App. 5.) The first question—whether reasonable representation of political subdivisions is a permissible rationale—was answered affirmatively by this Court in *Reynolds* v. *Sims, supra*:

> [A] state can rationally consider according political subdivisons some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. 377 U.S. at 580.

There is no substance to DuVal's argument that Virginia

has not in fact consciously chosen an independent-representation rationale for the House of Delegates. The fact that there are "no provisions in Virginia's Constitution requiring reapportionment plans to conform to county and city lines" (DuVal Br. 20) is irrelevant and inconsistent with the principle of State (as distinct from federal) constitutional law that "the state constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited; that except so far as restrained by the Constitution the legislature has plenary power." *Strawberry Hill Land Corp.* v. *Starbuck,* 124 Va. 71, 97 S.E. 362, 364 (1918). Thus what is important is not what is absent from the words of the state constitution, but what the legislature has enacted. *See also Sixty-Seventh Minnesota Senate* v. *Beens,* 406 U.S. 187, 198 (1972).

It is not inconsistent with the independent-representation rationale that Senate districts ignore city and county lines in favor of numerical equality (DuVal Br. 21); indeed, it is that very approach to one house that permits the focus on political subdivisions in the other. Similarly, the approach that Virginia has taken to *congressional* redistricting is irrelevant to the approach it is constitutionally permitted to take to the different problem of the redistricting of one house of the State Legislature. Nor is there any inconsistency in the legislature's treatment of the special problems created by Fairfax County's exceptionally large population[2] and by the

[2] As we have explained in our opening brief (p. 24 n. 9) Fairfax County is not "fragmented" but rather has simply been divided into two districts that more closely approximate the size of the other subdivisions that are represented in the House of Delegates. This is a refinement of the basic rationale designed to achieve more rather than less population equality.

remote potentiality of future annexations to existing subdivisions.[3]

Accordingly, we submit that the House of Delegates plan cannot be faulted unless the Court were to accept DuVal's proposed percentage-deviation rule as an inexorable yardstick for both houses of a bicameral state legislature. For the reasons we have given, such a rule would be inconsistent both with this Court's approach to the problem and with a governmental system that allows the States reasonable flexibility in structuring their own governmental systems to comport with local needs. Equally, with one exception it is inconsistent even with the lower court cases that DuVal cites as precedents.[4]

Two of the alleged percentage-deviation precedents are now before this Court for review, but even they were not decided on a simple arithmetic rationale. In *Cummings* v. *Meskill,* 341 F. Supp. 139 (D. Conn 1972), *prob. juris. noted sub. nom. Gaffney* v. *Cummings,* 41 L.W. 3183 (Oct. 10, 1972), the lower court found a lack of fair and effective representation because the state had "balanc[ed] the results [of the reapportionment] for partisan political fairness, that

[3] The provision for future boundary changes is designed to create reasonable stability by obviating redistricting in the event of future annexations. In any event, this provision has no foreseeable impact in view of the moratorium against such annexations that is now in force. Chap. 712, 1972 Acts of Assembly.

[4] *Skolnick* v. *Illinois State Electoral Board,* 307 F. Supp. 691 (N.D. Ill. 1969), did simply compare the numerical variations in *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969), as a basis for striking down the apportionment of the Illinois legislature. Precisely the same variances had just four years previously been declared valid by the same court, as well as by the Supreme Court of Illinois. *Germano* v. *Kerner,* 247 F. Supp. 141 (N.D. Ill. 1965); *People ex rel. Engle* v. *Kerner,* 210 N.E. 2d 165 (Ill. 1965). The resulting confusion is apparent.

is, to achieve an apparent balance of partisan political strength in the Assembly coinciding with the total state-wide partisan political balance measured by the results in the last three Assembly elections." 341 F. Supp. at 148. There is no such factor here, and furthermore that case does not involve any attempt, as here, to keep political boundaries intact. In *Graves* v. *Barnes,* 343 F. Supp. 704 (W.D. Texas 1972), *prob. juris. noted sub. nom. Bullock* v. *Register,* 41 L.W. 3183 (Oct. 10, 1972), the rejection of Texas' plan was based on a lack of rational and consistent State policy. As we have shown, the Commonwealth's plan does not lack a rational or consistent base.

Similarly the other cases relied on by DuVal go far beyond arithmetical calculation. In *Troxler* v. *St. John the Baptist Parish Police Jury,* 331 F. Supp. 222 (E.D. La. 1971), there had been "no attempt to justify any of the population deviations. . . ." (331 F. Supp. at 224), and each urban area involved had been divided into fragments scattered among predominantly rural districts. *Driggers* v. *Gallion,* 308 F. Supp. 632 (M.D. Ala. 1969) was decided on the basis of effective representation, not numbers; the court found greater equality to be practicable and rejected the only justification forwarded for the deviations—a guarantee of representation to the rural parts of the county. The same is true of the two Kansas cases, *Long* v. *Docking,* 282 F. Supp. 256 (D. Kan. 1968), and 283 F. Supp. 539 (D. Kan. 1968), decided one month apart. In the first case no justification was forwarded for the variance other than that the deviation was close enough and other cases had upheld larger variations—the reverse of appellee's argument. The Kansas legislature's next attempt at districting was rejected because "the evidence reveal[ed] that plans were offered to

the legislature which would have established districts with no greater population differences, with more compact districts, and with much fewer crossing of county lines. The evidence . . . leads to the conclusion that a majority of the members of the legislature, and more particularly the members of the State Senate, were motivated by other considerations than the constitutional objective of 'practical equality.' " 283 F. Supp. at 543. The most recent Iowa case, *In re Legislative Districting of Gen. Assembly,* 193 N.W. 2d 784 (Iowa 1972), similarly went far beyond a mere finding of percentage deviation; the problem there was that once an assumed "safe" percent deviation had been reached, all efforts to achieve further voter equality were abandoned and district lines were established based upon impermissible considerations. The earlier Iowa decision, *In re Legislative Districting of Gen. Assembly,* 175 N.W. 2d 20 (Iowa 1970), similarly found that the legislature adopted a *"de minimis"* standard . . . rather than equality 'as nearly as practicable' " (175 N.W. 2d at 26); insofar as that State court further stated—unnecessarily—that population variances must be rejected if they "exceed variances held indefensible in *Kirkpatrick* . . . and in *Wells* . . ." (175 N.W. 2d at 24) it was, we submit, in error.

2.

The Virginia Senate Was Properly Apportioned Into Single Member Districts Based On The 1970 Census.

Appellee Howell's brief provides no support for the district court's rejection—in the case of the Senate seats for the City of Norfolk—of *both* the Virginia Constitution's mandate that apportionment be based on population as determined by the decennial census *and* the Virginia legislature's decision that

senatorial districts should have single rather than multiple members.

The State constitutional decision to use the census—in terms of which the three seats in question were apportioned with near-perfect equality—was explicit and carefully considered. This is shown by the record of the debate on Article II, Section 6 of the current Constitution, which altered the previous reference to "inhabitants" (Sec. 55, Va. Const. of 1902):

> Senator Andrews: I hope it will be the pleasure of the Senate to reject the amendment [proposed by then Senator Howell to maintain the reference to "inhabitants."]
>
> The word used by your committee, the word "population," affords the broadest method we know of counting human beings. We used the word to update the language of the Constitution. When we reapportion, we reapportion on the decennial United States "population" census whose numbers we use and by which we are bound. The intent of the Privileges and Elections Committee, in using the modern word "population," is to include every living human being as counted by the decennial census of the United States Government.
>
> *Senator Howell:* I accept that explanation as constituting the constitutional interpretation of this Senate when they vote, and therefore I am withdrawing my amendment.
>
> *President Pollard:* The Senator withdraws the amendment. Senate Debates On Constitutional Revision, 1969, p. 88.

The question here, as in *Burns* v. *Richardson,* 384 U.S. 73 (1966), is whether a State has such a choice in the treatment it gives to more or less transitory individuals, such as students, migratory workers, long-distance commuters and (as here) military personnel. In *Burns,* the Court held that a State could choose to exclude some such individuals, but in

the process it left no doubt that a State could also choose to include them in a district as Virginia did in Norfolk.

> *"The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.* Unless a choice is one the Constitution forbids, cf., e.g., *Carrington* v. *Rash,* 380 U.S. 89, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds* v. *Sims* is to be measured thereby. [384 U.S. at 92; emphasis added.]

See also *YMCA, Inc.* v. *Lomenzo,* 377 U.S. 633, 641 (1964); *Prince* v. *Kramer* F. Supp. (W.D. Wash. 1972), *aff'd sub. nom. Washington State Labor Council* v. *Prince,* 41 L.W. 3167 (Oct. 10, 1972).

As the testimony of the Associate Director of the Bureau of the Census (App. 206-207) shows, the census treatment of the naval personnel here in question is based upon a long-standing, carefully considered pragmatic determination as to where such personnel should be placed "to avoid double counting; to avoid undercounting" (App. 207). Counting such personnel as on the ship to which they are assigned reflects the reality that "this is where they work, this is where they live during a considerable period of time, during a majority of their time and even when they are in port I understand they can leave the ship only at the . . . pleasure of the commander." (App. 207; see also App. 194.) And where they are for the majority of their time is where there is an "increased volume of demand for public services, e.g., police and fire protection, water supply, sewage disposal, highways, schools, and other county and municipal services." (App. 184.)

Virginia appropriately chose to incorporate this census decision—as well as all of the other principles of population allocation evolved in the census; this decision was, moreover, consistent with the approach to military personnel that Virginia had traditionally followed. See *Davis* v. *Mann*, 377 U.S. 678, 691-692 (1964).

The decision below would disrupt this consistent application of the decennial census on the basis of a Zip Code sample that the record demonstrated to be inaccurate. (See our opening brief at p. 36 n 13; J. App. 183, 200-203.) Unless there were some principle requiring each state to make an impossible effort to determine the domicile or voting residence of each and every person (with all the other problems about aliens, non-voters and other kinds of transients which this would raise but which the district court did not consider), such *ad hoc* disruptions of a consistent, reasoned approach should not be allowed. *Burns* v. *Richardson, supra,* makes it clear that there is no such principle, and that the courts must honor Virginia's policy of giving representation to its people where they are the majority of the time.

The result of the lower court's tampering with the census was a direction that Norfolk be converted into a multi-member Senate district, vitiating also the State's uniform policy of single-member representation. This compounds the error:

"Choosing between specific single-member legislative districts and multi-member districts is essentially a choice between political theories of representational democracy. That decision, once made by the Legislature, which all agree is the body primarily responsible for political decisions, is to be disturbed by the judiciary only upon specific proof that the adopted scheme of redistricting is actually functioning in a manner that minimizes or cancels out the voting strength of a cognizable racial or political element of the voting popu-

lation." *Chavis* v. *Whitcomb,* 305 F. Supp. 1364 (1969), reversed on other grounds, *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971).[5]

3.

In Any Event, The District Court Improperly Dictated A Districting Plan Without Allowing Virginia An Opportunity To Reapportion Itself.

Our opening brief amply shows the error of the district court's precipitous order—even assuming *arguendo* the correctness of its rejection of the Virginia plan—and appellees' attempts to justify it are without substance. The Virginia General Assembly was, as we have shown, ready to reconvene upon short notice in order to implement any decision that the district court might reach;[6] the court made no findings to the contrary or any effort to justify otherwise its displacement of the State legislative function by issuing a redistricting order simultaneously with its decision of invalidity.

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[5] Appellee Howell's further argument that the single-member districts in Norfolk would impermissibly dilute the black vote there is based on factual assertions concerning which the district court made no findings and also ignores other pertinent facts; the record shows (J. App. 173-174) that the nonwhite minority in two of the three Norfolk Senate districts would be a larger percentage than it is in the city as a whole. Moreover, the short answer to this contention is that the Attorney General of the United States has found no violations of the Voting Rights Act. (J. App. 54) Howell's Remaining Contention—that Federal regulations prohibited campaigns on naval shore installations—is completely irrelevant to apportionment principles. Additionally such regulations may not be as prohibitive as asserted. See *e.g., Flower* v. *U.S.,* 407 U.S. 197 (1972); *Spock* v. *David,* ..... F.2d ....., 41 L.W. 2242 (3rd Cir. 1972) *stay denied; Laird* v. *Spock,* 41 L.W. 3271 (Nov. 3, 1972).

[6] For the convenience of the Court we have set forth, as an appendix, a narrative chronology of the General Assembly's actions.

Appellees' attempts at *post hoc* justification of the district court's procedure are without substance:

(a) The subsequent inaction by the 1972 Session of the General Assembly in no way cures the error of the court's 1971 order. Surely the Commonwealth is entitled to pursue its appellate remedies (as House Joint Resolution 110 of the 1971 Session directed the Attorney General to do) without rendering those remedies moot. By the same token, it obviously had no obligation to attempt to anticipate the district court's decision before it was decreed.

(b) A validation by this Court of the General Assembly's plan would cause no disruption. All members of the House of Delegates are to be elected in November 1973 (§24.1-11, Code of Virginia (1950), as amended), and they would simply run for election from those districts originally established by the General Assembly in 1971. At the same time a special election could be held for the three senators whose districts are involved in this appeal. *Mann* v. *Davis,* 238 F. Supp. 458 (E.D. Va. 1964), *aff'd.* 379 U.S. 694 (1965). No "legislative vacuum" would exist. The laws enacted by the General Assembly at its 1972 session would certainly be valid and no disruption of government would occur. *See, e.g., Mann* v. *Davis,* 245 F. Supp. 241, 246 (E.D. Va. 1965), *aff'd. sub nom. Burnette* v. *Davis,* 382 U.S. 42 (1965); *Ryan* v. *Tinsley,* 316 F. 2d 430 (10th Cir 1963), *cert. denied* 375 U.S. 17 (1963).

CONCLUSION

For the foregoing reasons we submit that the decision of the lower court should be reversed and the cause remanded with instruction to dismiss the complaints or, failing that, to allow the Virginia General Assembly an opportunity to re-

district itself, in accord with constitutional principles this Court may establish in its opinion.

Respectfully submitted,

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CERTIFICATE

I, Anthony F. Troy, Special Assistant to the Attorney General for the Commonwealth of Virginia, a member of the bar of the Supreme Court of the United States, and one of counsel for appellants, hereby certify that three (3) copies of the foregoing Reply Brief on Behalf of Appellants were on this 28th day of November, 1972 mailed to:

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The facts in this case are that the legislature met on January 6, 1971, as mandated by the revised Virginia Constitution, *Schedule,* Section 5. It completed its reapportioning responsibilities including enactment of legislative and congressional redistricting plans, on February 26, 1971. Between that date and adjournment *sine die* on July 8, 1971, the Journals of both Houses show a legislature willing to insure that its reapportionment plans complied with constitutional requisites, as interpreted by the federal executive branch of government on the one hand and the federal judiciary on the other.

Having fulfilled the mandate of the Virginia Constitution, the Assembly on Friday, February 26, 1971, adjourned "to stand in recess until March 29, 1971." (HJR 82, Senate Journal, p. 528.) The redistricting plans were submitted to the Attorney General of the United States, on the following Monday, March 1, 1971, for review under the Voting Rights Act. (J. App. p. 51.) It was anticipated that the Attorney General would expedite consideration of the plans. He did not. (J. App. p. 51.)

The Assembly on March 29, 1971, reconvened in accordance with House Joint Resolution 82. Since neither the At-

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Section 5. First session of General Assembly following adoption of revised Constitution.

The General Assembly shall convene at the Capitol at noon on the first Wednesday in January, nineteen hundred and seventy-one. It shall enact such laws as may be deemed proper, including those necessary to implement this revised Constitution. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with Article II, Section 6, of this Constitution. The General Assembly shall be vested with all the powers, charged with all the duties, and subject to all the limitations prescribed by this Constitution except that this session shall continue as long as may be necessary; that the salary and allowances of members shall not be limited by Section 46 of the Constitution of 1902 as amended and that the effective date limitation of Section 53 of the Constitution of 1902 as amended shall not be operative.

torney General nor the lower court had taken any action, the Assembly on that date "adjourned to stand in recess until Monday, May 10, 1971, at 12 o'clock noon, unless reconvened sooner by the Governor or the Speaker of the House of Delegates and President of the Senate." (HJR 93, Senate Journal, p. 640.) This date, May 10, 1971, allowed for more than the statutory sixty days in which the Attorney General would complete his review. Such review was completed, though not within sixty days, on Friday, May 7, 1971. (J. App. p. 51.)

The Attorney General objected to the division of Senatorial districts five (5) and six (6) in the City of Norfolk. He further objected to multi-member district House seats in five cities of the Commonwealth. The latter objection was based on a prognostication of affirmance of the District Court's order in *Chavis* v. *Whitcomb, supra.* (J. App. p. 52.) The Assembly reconvened on May 10, 1971. (Senate Journal, p. 644.) Since *Whitcomb* v. *Chavis, supra,* was still awaiting decision by this Court, and the validity of the plans including the Senate and House districts objected to by the Attorney General was pending trial in the lower court, the Assembly decided to "stand in recess until Tuesday, June 22, 1971 at 12 o'clock noon, unless reconvened sooner . . ." (HJR 98, Senate Journal, pp. 656-657.) This date allowed for a decision by the lower court as well as a decision in *Chavis* by this Court prior to its summer recess.

The lower court's "Order on First Hearing" (J. App. p. 43.) entered on May 24, 1971, brought the General Assembly back into session on Thursday, June 3, 1971. (See Senate Journal, p. 662.) This order required the General Assembly to cure the objections interposed by the Attorney General. (J. App. p. 45.) Senate Bill 125 was introduced to comply with the lower court's order

to cure the objections that the Attorney General interposed to the Senate Districts. (Senate Journal, p. 664.) As to the objections interposed by the Attorney General to the House districts, the Assembly adjourned to June 7, 1971, to await this Court's decision in *Chavis*. (Senate Journal, p. 669.) On Monday, June 7, 1971, the Assembly reconvened. This Court on that same date handed down its decision in *Whitcomb* v. *Chavis, supra;* the Attorney General rightfully withdrew his objections to the House plan (J. App. p. 53); the Assembly passed Senate Bill 125 (Senate Journal, pp. 667, 700) and "adjourned to stand in recess until Monday, August 16, 1971 at 12 o'clock noon, unless reconvened sooner," (HJR 105, Senate Journal, p. 702) thus awaiting the lower court's decision. The lower court entered its decision on July 2, 1971, ordering into effect its own plan of reapportionment. The Assembly, other than requesting an appeal of such decision, could take no further action and adjourned *sine die*. (See HJR 111, July 8, 1971, Senate Journal p. 747-8.)

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In The

Supreme Court of the United States

No. 71-373

CITY OF VIRGINIA BEACH,
Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

and

CITY OF VIRGINIA BEACH,
Appellant,

v.

STANFORD E. PARRIS, ET AL.,
Appellees.

and

CITY OF VIRGINIA BEACH,
Appellant,

v.

CLIVE L. DuVAL, II, ET AL.,
Appellees.

On Direct Appeal from the United States District Court
for the Eastern District of Virginia

REPLY BRIEF FOR THE APPELLANT

The arguments of appellees DuVal, Howell and the City of Norfolk will not withstand analysis in terms of the facts, legal precedents, and the policy considerations involved in this appeal. Without discussing each argument seriatim or unnecessarily repeating arguments made in its opening brief, the City of Virginia Beach will explain why this is so—first, with regard to the District Court's holding and plan; secondly, with regard to the misuse of its judicial power.

I.

There Is No Justification For The District Court's Impetuous Decision And Ill-Considered Plan.

The appellant's position is that a state reapportionment plan should be tested, not solely on the basis of numerical comparisons among districts, but also in terms of the quality of representation it affords to the people. Equal representation is not guaranteed simply because districts have been arbitrarily drawn to contain an identical number of persons.

As our opening brief makes clear, this Court's *state* reapportionment decisions support this view. (Brief of Appellant at 9-18). This Court has never interpreted the Equal Protection Clause as requiring precise mathematical equality among state legislative districts to the exclusion of all other factors. In *Reynolds* v. *Sims*, 377 U.S. 533, 565-66, 577 (1964), the Court recognized that "the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative reapportionment" and that "[m]athematical exactness or precision is hardly a workable constitutional requirement." Consideration may be given to factors other than population which affect the quality of representation, such as integrity of political subdivisions, community interests and geography. If the Equal Protection Clause is ever interpreted as requiring such factors to be ignored and thus reducing state reapportionment to a simplistic mathematical exercise, rational policy-making will be precluded and reapportionment will then become a science, not an art.* Reapportionment will no longer be a matter "for legislative consideration and determination." *Id.* at 586.

Affirmance of the District Court's decision would mean

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* Plato recognized centuries ago in Chapter III of the *Republic* that governing is an art, not a science.

that mathematical computations, such as population deviation percentages and population variance ratios, are the sole test of compliance with the Equal Protection Clause. But bald mathematical figures are not accurate indexes of equal representation. They can be quite misleading, as so dramatically demonstrated in the case of Virginia Beach.* To correct the 7.3% deviation in its House district, 29,136 of its citizens were transferred to Norfolk's House district where they now vote with the 307,951 citizens of Norfolk for seven delegates who speak for Norfolk. Undeniably, this transfer has resulted in greater *mathematical* equality, for the deviation was reduced to 0.2%. But the quality of representation afforded these citizens has been lost. They can no longer vote with their fellow Virginia Beach citizens with whom they share community interests.

Similarly, no political advantage was gained by any of the Virginia voters who, because they would be mathematically "underrepresented" voting with the other residents of their community, now must vote for delegates representing other counties and cities. Besides creating slightly more mathematical equality among House districts, the exercise by the District Court of its judicial power over the General Assembly accomplished nothing. *Who* a person has an opportunity to vote for can be as important as *how much* his vote is theoretically worth.

The General Assembly's House plan came as close as possible to mathematical equality while maintaining the integrity of the community interests shared by residents of the same political subdivisions. Unable to contradict this critical fact, DuVal argues that Virginia has abandoned its long tradition of respecting the integrity of political subdivisions.

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* Maximum population variances, such as the 16.4% (or 23.6%) variance in Virginia's House plan, are especially misleading since they focus on the extremes within a plan, not on its overall equality. (See Brief of Appellant at 19.)

This argument totally ignores the policy evidenced by the General Assembly's plan, and its authority to develop policy consistent with its constitutional duty to implement it in a way that will not submerge population as the controlling criterion. For example, the General Assembly had to provide that a city's annexation of additional territory would have no effect on House district lines; otherwise the population in the districts involved would be thrown out of proportion.

Appellees' arguments cannot overcome the fact that in reapportioning the Virginia House of Delegates, the General Assembly continued to maintain the integrity of political subdivisions. Admittedly, the plan resulted in some deviation from precise mathematical equality.* The question, however, is not whether other district courts have overturned state plans characterized by larger or smaller population variance percentages. The question is whether the slight population inequality, which was the unavoidable result of respecting political subdivision lines in Virginia, renders *its* plan unconstitutional.

This question was not answered by the District Court, nor do the appellees attempt to answer it now. They take the position that there is a mystical percentage variation above which any state reapportionment plan is unconstitutional. They have pinpointed the maximum permissible variation at somewhere between the 10.3% variation in the District Court's plan (which they argue is constitutional) and the 16.4% (or 23.6%) variation in the General Assembly's plan (which they contend is unconstitutional). Since no consideration need be given to whether a plan gives voters

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* Appellee DuVal makes much of the fact that under his method of calculating the deviation in one floater district, the total variance in the House plan was 23.6%—not the 16.4% figure used in our opening brief. We simply adopted the figure used by the District Court in holding the General Assembly's plan unconstitutional. 330 F.Supp. at 1139.

an effective and meaningful voice in the selection of representatives, this approach does have one merit—it facilitates judicial review of reapportionment plans. But simplicity in the law is not a benefit when it results in oversimplification of complex issues.

While political subdivisions in Northern Virginia were underrepresented under the General Assembly's House plan, the area as a whole was overrepresented in the Senate and Congress. For example, Prince William County's underrepresentation in the House of Delegates is compensated for by its 4.4% overrepresentation in the Senate. These facts have been ignored by DuVal in his arbitrary selection of one region to compare with another, and by the District Court despite this Court's statement or more than one occasion that consideration of the overall effect of representation in both houses of a bicameral state legislature is "indispensable." *Burns* v. *Richardson,* 384 U.S. 73, 82 (1966); *Maryland Committee* v. *Tawes,* 377 U.S. 656, 673 (1964).

As a result of the District Court's transfer to Northern Virginia of one floater delegate shared by Virginia Beach, all political subdivisions in the Tidewater area are now underrepresented in the House of Delegates by an average of 3.4%. The only significant effect of this transfer was to change which area is discriminated against in the House of Delegates. Northern Virginia is certainly no longer the subject of discrimination. It is difficult to understand how the Equal Protection Clause could have required the District Court to upset the General Assembly' plan in order to give the area overrepresentation in both the House and Senate.

In holding the General Assembly's plan unconstitutional, the District Court looked no farther than its 16.4% total variation. It did not consider whether this variation would

make possible a more meaningful vote for the citizens of Virginia. In transferring a delegate from Tidewater to Northern Virginia, it looked no farther than the statistical data selectively presented by the appellees, not at the overall representation of Northern Virginia. In *Kelly* v. *Bumpers,* 340 F.Supp. 568 (E.D. Ark. 1972), a district court in Arkansas was faced with a similar situation in which the court could have used its powers to produce somewhat more mathematical equality by changing district lines here and there. But the court was not concerned solely with mathematical exactness; it also considered the important factor of effective representation for people who shared community interests. The court refused to sacrifice community interest for the sole purpose of achieving mathematical exactness, stating:

> "Similarly, revising district lines to increase the population of some small districts would hardly produce constitutional advantages to the people involved comparable to the practical disadvantages that the revisions would entail." 340 F.Supp. at 582.

Constrasting that court's judicious approach to reapportionment with the heavy-handed and simplistic method employed by the District Court in disposing of the General Assembly's plan demonstrates the error below. The Arkansas court recognized that there is more to equal representation than mere numbers, that no reapportionment plan can be perfect, and that a court should not invalidate a legislative plan because some enterprising plaintiff can demonstrate that it has certain faults. The court said:

> "We think it obvious that no plan can be devised for the apportionment of the Arkansas Legislature that will suit all interested individuals and groups, and that probably no plan can be devised that is free from defects or upon which improvements could not be made." 340 F.Supp. at 586.

II.

The District Court's Misuse Of Its Judicial Power Requires Reversal.

Appellees would have this Court disapprove a carefully conceived legislative plan that contains only so much deviation from mathematical equality as necessary to preserve the integrity of political subdivisions and approve a court-prepared plan containing only slightly less variation while destroying the integrity of political subdivisions. But they also ask this Court to condone the manner in which the court prepared its plan without holding any hearing whatsoever and without giving the General Assembly any opportunity to prepare a plan acceptable to the court. Such a use of judicial power is indefensible.

The City of Norfolk contends that Virginia Beach has no "status" to object to the District Court's plan because it did not attempt to raise the issue of reapportionment until after the District Court filed its order on July 2, 1971. But how can Virginia Beach be estopped from making arguments on appeal that it never was afforded an opportunity to make below? It was only after the court issued its order declaring the General Assembly's plan unconstitutional and substituting its own plan in one bold judicial tour de force that Virginia Beach had any idea that its representation was to be altered. The portion of the District Court's plan which so dramatically affects Virginia Beach—the inclusion of 29,136 of its citizens in Norfolk's seven-member House district—was not a remedy sought by any of the parties. It was not considered or even mentioned during trial of the case. There was no invitation by the court for parties to submit suggested plans, no hearing on the merits of the court's plan and no advance notice of what it contained.

Appellees Howell and DuVal persist in depicting the General Assembly as unreasonably obstinate—defiantly clinging to an unconstituional plan in the face of all reason. On the contrary, any disinterested person would be amazed at the extreme deference accorded by the General Assembly to the District Court and at the corresponding lack of comity demonstrated by the court's refusal to remand the case for preparation of a new plan.

Howell's statements that the State "failed to comply with the Court's order" (Brief of Howell at 11) and that the General Assembly was "given a second chance" (Brief of Howell at 24) find no support whatsoever in the record. DuVal calls the General Assembly "stubbornly resisting" because it refused to change its "unconstitutional" House plan "despite repeated warnings by appellee DuVal." (Brief of DuVal at 28-29). A similar contention was made by Howell in his Motion to Affirm. (Motion to Affirm of Howell at 4-5). These statements should be recognized for what they are—self-serving arguments by members of the General Assembly who were unable to convince their fellow assemblymen to adopt their plans. The General Assembly was certainly not required to accept Howell and DuVal as final arbiters of the meaning of the United States Constitution.

The record demonstrates unquestionably that the General Assembly was standing by for the sole purpose of remedying any defects in its plan and that the District Court did not give the General Assembly any opportunity to prepare an acceptable plan after holding the plan unconstitutional. (See Appendix, Reply Brief of Appellants in No. 71-364.) And surely it was not incumbent on the General Assembly to submit, on its own initiative, alternative plans in anticipation that the court might hold its plan unconstitutional.

DuVal argues that "time was of the essence." But it took the District Court 16 days (from June 16 until July 2) to

announce its decision and prepare its own plan. Certainly the court could have announced its holding more expeditiously and given the General Assembly some limited time to prepare a plan. Moreover, there was no reason why the plan had to be implemented by July 2. The court had already postponed the date of the primary elections. It could have postponed them further, postponed the effect of the sixty-day filing rule for candidates, or even permitted the elections to be held under the General Assembly's plan with directions that a new plan be prepared for all subsequent elections. The fact remains that had the District Court seen fit to give the General Assembly an opportunity to prepare a new plan, there was nothing to prevent it from doing so.

In arguing that the failure of the General Assembly to enact a new plan after the decision below constitutes an acceptance of the court's plan, DuVal fails to take into account several considerations. The first is that the General Assembly was not convinced of the correctness of the District Court's decision—it resolved to pursue this appeal. Secondly, under the law as interpreted by the District Court, the General Assembly would have had to ignore political subdivision lines in reapportioning the House of Delegates. Understandably, it did not want to abandon longstanding tradition, especially since no holding of this Court requires it. Moreover, had the General Assembly done so, it is almost a certainty that some disgruntled legislator or political interest group would have instituted a new suit attacking the constitutionality of the plan and the General Assembly would have been forced to defend its reapportionment all over again.

CONCLUSION

The District Court's holding should be reversed and Virginia's plan for the reapportionment of the House of Delegates and Senate reinstated. If this Court should find the General Assembly's plan unconstitutional, it should not allow the District Court's plan to stand, but should either remand the case with directions that the General Assembly be permitted an opportunity to prepare a new reapportionment plan under meaningful standards determined by this Court or remand with directions that the case be reopened and the City of Virginia Beach be permitted an opportunity to be heard on the formation of a new reapportionment plan.

Respectfully submitted,

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Dated: December 6, 1972

CERTIFICATE OF SERVICE

I, Harry Frazier, III, counsel for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Reply Brief for the Appellant in the United States Mails, first class postage prepaid, this 6th day of December, 1972, addressed to:

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and by depositing one copy of the foregoing Reply Brief for the Appellants in the United States Mails, first class postage prepaid, this 6th day of December, 1972, addressed to Armand Derfner, Esq., 5200 Woodward Bldg., 733 15th Street, N.W., Washington, D. C. 20005; The Hon. James M. Thomson, P.O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esq., 1425 H Street, N.W., Suite 822, Washington, D. C. 20005; The Hon. Stanford E.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MAHAN, SECRETARY, STATE BOARD OF ELECTIONS, ET AL. *v.* HOWELL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 71-364. Argued December 12, 1972—
Decided February 21, 1973*

The Virginia General Assembly in 1971 reapportioned the State for the election of state delegates and senators. The apportionment statutes, on challenge by appellees, were invalidated by a three-judge District Court, which ruled the reapportionments impermissible violations of the "one person, one vote" principle. The court substituted its own electoral districts, reducing to about 10% the percentage variation from the ideal district from the approximately 16% variation permitted by the legislature's plan but, contrary to that plan, in many instances not following political subdivision lines. *Held:*

1. Reapportionment of Virginia's House of Delegates electoral districts complied with the Equal Protection Clause of the Fourteenth Amendment, since the legislature's maximum population percentage variation, which was not excessive, resulted from the State's rational objective of preserving the integrity of political subdivision lines. Pp. 4–14.

(a) In the implementation of the basic constitutional principle that both houses of a bicameral state legislature be apportioned substantially on a population basis (*Reynolds* v. *Sims*, 377 U. S. 533), more flexibility is permissible with respect to state legislative reapportionment than with respect to congressional redistricting. Pp. 4–5.

(b) The State's objective of preserving the integrity of political subdivision lines is rational since it furthers the legislative

*Together with No. 71-373, *City of Virginia Beach* v. *Howell et al.*, and No. 71-444, *Weinberg* v. *Prichard et al.*, on appeals from the same court.

purpose of facilitating enactment of statutes of purely local concern and preserves for the voters in the political subdivisions a voice in the state legislature on local matters. Pp. 5–12.

(c) Given the wider constitutional latitude in state legislative reapportionment, the population disparities reflected in the legislature's maximum percentage deviation are within tolerable constitutional limits. Pp. 12–14.

2. The establishment by the legislature of three numerically ideal senatorial electoral districts by assigning to one of them about 36,700 persons who were "homeported" at the U. S. Naval Station, Norfolk, regardless of where they actually resided, because that is where they were counted on official census tracts, was constitutionally impermissible discrimination against military personnel, cf. *Davis* v. *Mann*, 377 U. S. 678; and the District Court, which was under severe time pressures, did not abuse its discretion in prescribing an interim plan of combining the three districts into one multimember district. Pp. 14–17.

330 F. Supp. 1138, affirmed in part, reversed in part.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and MARSHALL, JJ., joined. POWELL, J., took no part in the consideration or decision of the cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 71-364, 71-373, AND 71-444

John S. Mahan, Secretary, State Board of Elections, et al., Appellants,
71-364 *v.*
Henry E. Howell, Jr., et al.

City of Virginia Beach, Appellant,
71-373 *v.*
Henry E. Howell, Jr., et al.

Robert L. Weinberg, Appellant,
71-444 *v.*
Edgar A. Prichard et al.

On Appeals from the United States District Court for the Eastern District of Virginia.

[February 21, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Acting pursuant to the mandate of its newly revised state constitution,[1] the Virginia General Assembly enacted statutes apportioning the State for the election of

[1] Article II, § 6 of the Revised Virginia Constitution provides:

"Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

"Any such reapportionment law shall take effect immediately and

members of its House of Delegates[2] and Senate.[3] Two suits were brought challenging the constitutionality of the House redistricting statute on the grounds that there were impermissible population variances in the districts, that the multimember districts diluted representation,[4] and that the use of multimember districts constituted racial gerrymandering.[5] The Senate redistricting statute was attacked in a separate suit which alleged that the city of Norfolk was unconstitutionally split into three districts, allocating Navy personnel "homeported" in Norfolk to one district and isolating Negro voters in one district. Three three-judge district courts were convened to hear the suits pursuant to 28 U. S. C. §§ 2281 and 2284. The suits were consolidated and heard by the four judges who made up the three three-judge panels.

The consolidated District Court entered an interlocu-

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not be subject to the limitations contained in Article IV, Section 13, of this Constitution."

[2] C. 116, Va. Code § 24.1–12.1.

[3] C. 120, Va. Code § 24.1–14.1, as amended by c. 246, Acts of Assembly, June 14, 1971.

[4] The reapportionment statutes were originally passed on March 1, 1971. On May 7, 1971, the Attorney General of the United States, acting pursuant to § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973 (c), interposed objections to both the House and the Senate plans. Objections to the House plan were based on the use of five multimember districts in certain metropolitan areas. Between his interposition and the trial of these cases, this Court decided *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), and the Attorney General's objections to the House plan were subsequently withdrawn. The remaining objection to the Senate plan was cured by the amendment contained in c. 246, *supra*, n. 3.

[5] The Court initially noted probable jurisdiction in the related case of *Thornton* v. *Prichard*, No. 71–533. This appeal primarily involved the question of whether or not the multimember districts had a discriminatory effect on the rights of Negro voters under § 5 of the Voting Rights Act, *supra*, n. 4, as well as under the Fourteenth and Fifteenth Amendments. On appellant's own motion, this appeal was dismissed.

tory order which, *inter alia*, declared the legislative reapportionment statutes unconstitutional and enjoined the holding of elections in electoral districts other than those established by the court's opinion. *Howell* v. *Mahan*, 330 F. Supp. 1138, 1150 (ED Va. 1971). Appellants, the Secretary of the State Board of Elections and its members and the City of Virginia Beach, have appealed directly to this Court from those portions of the court's order, invoking our jurisdiction under 28 U. S. C. § 1253.

I

The statute apportioning the House provided for a combination of 52 single-member, multimember and floater delegate districts from which 100 delegates would be elected. As found by the lower court, the ideal district in Virginia consisted of 46,485 persons per delegate, and the maximum percentage variation from that ideal under the Act was 16.4%—the 12th district being overrepresented by 6.8% and the 16th district being underrepresented by 9.6%.* The population ratio between these two districts was 1.18 to 1. The average percentage variance under the plan was ±3.89%, and the minimum population percentage necessary to elect a majority of the House was 49.29%. Of the 52 districts, 35 were within 4% of perfection and nine exceeded a 6% variance from the ideal. With one exception the delegate districts followed political jurisdictional lines

*These are the figures found by the District Court. Appellee DuVal argues that another method of computation involving Virginia's floterial districts results in a maximum deviation of 23.6%. The State and the City of Virginia Beach disputed that the deviation for the district relied on by DuVal for his figure was as much as claimed. The lower court made no finding on that dispute concluding that the 16.4% variation was "sufficient to condemn the plan." 330 F. Supp. 1139–1140. We decline to enter this imbroglio of mathematical manipulation and confine our consideration to the figures actually found by the court and used to support its holding of unconstitutionality.

of the counties and cities. That exception, Fairfax County, was allotted 10 delegates but was divided into two five-member districts.

Relying on *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), *Wells* v. *Rockefeller*, 394 U. S. 542 (1969), and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), the District Court concluded that the 16.4% variation was sufficient to condemn the House statute under the "one person, one vote" doctrine. While it noted that the variances were traceable to the desire of the General Assembly to maintain the integrity of traditional county and city boundaries, and that it was impossible to draft district lines to overcome unconstitutional disparities and still maintain such integrity, it held that the State proved no governmental necessity for strictly adhering to political subdivision lines. Accordingly, it undertook its own redistricting and devised a plan having a percentage variation of slightly over 10% from the ideal district, a percentage it believed came "within the passable constitutional limits as 'a good-faith effort to achieve absolute equality.' *Kirkpatrick* v. *Preisler*. . . ." *Howell* v. *Mahan*, *supra*.

Appellants contend that the District Court's reliance on *Kirkpatrick* v. *Preisler*, *supra*, and *Wells* v. *Rockefeller*, *supra*, in striking down the General Assembly's reapportionment plan was erroneous, and that proper application of the standards enunciated in *Reynolds* v. *Sims*, *supra*, would have resulted in a finding that the statute was constitutional.

In *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller*, this Court invalidated state reapportionment statutes for federal congressional districts having maximum percentage deviations of 5.97% and 13.1% respectively. The express purpose of these cases was to elucidate the standard first announced in the holding of *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), that "the command of Art. I, § 2, that Representatives be chosen 'by the Peo-

ple of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.*, at 7–8 (footnotes omitted.) And it was concluded that that command "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick* v. *Preisler*, *supra*, at 531. The principal question thus presented for review is whether or not the Equal Protection Clause of the Fourteenth Amendment likewise permits only "the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality" in the context of state legislative reapportionment.[7]

This Court first recognized that the Equal Protection Clause of the Fourteenth Amendment requires both houses of a bicameral state legislature to be apportioned substantially on a population basis in *Reynolds* v. *Sims*, *supra*. In so doing, it suggested that in the implementation of the basic constitutional principle—equality of population among the districts—more flexibility was constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting. *Id.*, at 578. Consideration was given to the fact that, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, and that therefore it may be feasible for a State to use political subdivision lines to a greater extent in establishing state legislative districts than congressional districts while still affording adequate statewide representation. *Ibid.* Another possible justification for deviation from population-based representation in state legislatures was stated to be:

". . . [T]hat of insuring some voice to political subdivisions, as political subdivisions. Several fac-

[7] In *Connor* v. *Williams*, 404 U. S. 549 (1972), we expressly reserved decision on this issue.

> tors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. . . ." *Id.*, at 580–581.

The Court reiterated that the overriding objective in reapportionment must be "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*, at 578–579.

By contrast, the Court in *Wesberry* v. *Sanders*, *supra*, recognized no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision. Thus, whereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, § 2, broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting because of the considerations enumerated in *Reynolds* v. *Sims*, *supra*. The dichotomy between the two lines of cases has consistently been maintained. In *Kirkpatrick* v. *Preisler*, for example, one asserted justification for population variances was that they were necessarily a result of the State's attempt to avoid fragmenting political subdivi-

sions by drawing congressional district lines along existing political subdivision boundaries. This argument was rejected in the congressional context. But in *Abate* v. *Mundt*, 403 U. S. 182 (1971), an apportionment for a county legislature having a maximum deviation from equality of 11.9% was upheld in the face of an equal protection challenge, in part because New York had a long history of maintaining the integrity of existing local government units within the county.

Application of the "absolute equality" test of *Kirkpatrick* and *Wells* to state legislative redistricting may impair the normal functioning of state and local governments. Such an effect is readily apparent from an analysis of the District Court's plan in this case. Under Art. VII, §§ 2 and 3 of Virginia's Constitution, the General Assembly is given extensive power to enact special legislation regarding the organization of, and the exercise of governmental powers by, counties, cities, towns and other political subdivisions. The statute redistricting the House of Delegates consistently sought to avoid the fragmentation of such subdivisions, assertedly to afford them a voice in Richmond to seek such local legislation.

The court's reapportionment, based on its application of *Kirkpatrick* and *Wells*, resulted in a maximum deviation of slightly over 10%,[8] as compared with the roughly 16% maximum variation found in the plan adopted by the legislature. But to achieve even this limit of variation, the court's plan extended single and multimember districts across subdivision lines in 12 instances, substituting population equality for subdivision representation. Scott County, for example, under the Assembly's plan was placed in the first district and its population

[8] The lower court concluded that its spread was only slightly over 7%, but in its arithmetic it did not consider two counties because of their asserted isolation from the remainder of the State. *Howell* v. *Mahan*, *supra*, 330 F. Supp., at 1147, n. 8.

of 24,376 voted with the 76,346 persons in Dickinson, Lee, and Wise Counties for two delegates. The district thus established deviated by 8.3% from the ideal. The court transferred five of Scott County's enumeration districts, containing 6,063 persons, to the continguous second district composed of the City of Bristol, and Smyth and Washington Counties, population 87,041. Scott County's representation was thereby substantially reduced in the first district, and all but nonexistent in the second district. The opportunity of its voters to champion local legislation relating to Scott County is virtually nil. The countervailing benefit resulting from the court's readjustment is the fact that the first district's deviation from the ideal is now reduced to 1.8%.

The City of Virginia Beach saw its position deteriorate in a similar manner under the court-imposed plan. Under the legislative plan, Virginia Beach constituted the 40th district and was allocated three delegates for its population of 172,106. The resulting underrepresentation was cured by providing a floterial district, the 42d, which also included portions of the Cities of Chesapeake and Portsmouth. Under the court's plan, the 42d district was dissolved. Of its 32,651 persons that constituted the deviation from the ideal for the 40th district, 3,515 were placed in the 40th, and 29,136 were transferred to Norfolk's 39th district. The 39th district is a multimember district which includes the 307,951 persons who make up the population of the City of Norfolk. Thus those Virginia Beach residents who cast their vote in the 39th district amount to only 8.6% of that district's population. In terms of practical politics, Virginia Beach complains that such representation is no representation at all so far as local legislation is concerned, and that those 29,136 people transferred to the 39th district have in that respect been effectively disenfranchised.

We conclude therefore that the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that *Kirkpatrick* and *Wells* make applicable to congressional reapportionment, but instead by the equal protection test enunciated in *Reynolds* v. *Sims*, *supra*. We reaffirm its holding that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." We likewise reaffirm its conclusion that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Id.*, at 579.

The asserted justification for the divergences in this case—the State's policy of maintaining the integrity of political subdivision lines—is not a new one to this Court. In *Davis* v. *Mann*, 377 U. S. 678, 686 (1964), it was noted:

> "Because cities and counties have consistently not been split or divided for purposes of legislative representation, multimember districts have been utilized for cities and counties whose population entitle them to more than a single representative. . . . And because of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed only of combinations of counties and cities and not by pieces of them. . . ."

The then existing substantial deviation in the apportionment of both Houses defeated the constitutionality of Virginia's districting statutes in that case, but the

possibility of maintaining the integrity of political subdivision lines in districting was not precluded so long as there existed "such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock*, 377 U. S. 695, 710 (1964).

We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with the political subdivisions is irrational. And if that be so, the decision of the General Assembly to provide representation to subdivisions *qua* subdivisions in order to implement that constitutional power is likewise valid when measured against the Equal Protection Clause of the Fourteenth Amendment. The inquiry then becomes whether it can reasonably be said that the state policy urged by Virginia to justify the divergences in the legislative reapportionment plan of the House is indeed furthered by the plan adopted by the legislature, and whether if so justified the divergences are also within tolerable limits. For a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality.

There was uncontradicted evidence offered in the District Court to the effect that the legislature's plan, subject to minor qualifications, "produces the minimum deviation above and below the norm, keeping intact political boundaries. . . ." (Defendant's Exhibit 8.) That court itself recognized that equality was impossible if political boundaries were to be kept intact in the process of districting. But it went on to hold that since the State "proved no governmental necessity for strictly adhering to political subdivision lines," the legislative plan was constitutionally invalid. *Howell* v. *Mahan*, *supra*, at 1140. As we noted above, however, the proper

equal protection test is not framed in terms of "governmental necessity," but instead in terms of a claim that a State may "rationally consider." *Reynolds* v. *Sims*, *supra*, 580–581.

The District Court intimated that one reason for rejecting the justification for divergences offered by the State was its conclusion that the legislature had not in fact implemented its asserted policy, "as witness the division of Fairfax County." *Howell* v. *Mahan*, *supra*, at 1140. But while Fairfax County was divided, it was not fragmented. And had it not been divided, there would have been one ten-member district in Fairfax County, a result which this Court might well have been thought to disfavor as a result of its opinion in *Connor* v. *Johnson*, 402 U. S. 690, 692 (1971). The State can scarcely be condemned for simultaneously attempting to move toward smaller districts and to maintain the integrity of its political subdivision lines.

Appellees argue that the traditional adherence to such lines is no longer a justification since the Virginia constitutional provision regarding reapportionment, Art, II, § 6. *supra*, n. 1, neither specifically provides for apportionment along political subdivision lines nor draws a distinction between the standards for congressional and legislative districting. The standard in each case is described in the "as nearly as is practicable" language used in *Wesberry* v. *Sanders*, *supra*, and *Reynolds* v. *Sims*, *supra*. But as we have previously indicated, the latitude afforded to States in legislative redistricting is somewhat broader than that afforded to them in congressional redistricting. Virginia was free as a matter of federal constitutional law to construe the mandate of its Constitution more liberally in the case of legislative redistricting than in the case of congressional redistricting, and the plan adopted by the legislature indicates that she has done so.

We also reject the argument that because the State is not adhering to its tradition of respecting the boundaries of political subdivisions in congressional and State Senate redistricting. it may not do so in the case of redistricting for the House of Delegates. Nothing in the fact that Virginia has followed the constitutional mandate of this Court in the case of congressional redistricting, or that it has chosen in some instances to ignore political subdivision lines in the case of the State Senate, detracts from the validity of its consistently applied policy to have at least one house of its bicameral legislature responsive to voters of political subdivisions as such.[9]

We hold that the legislature's plan for apportionment of the House of Delegates may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions. The remaining inquiry is whether the population disparities among the districts which have resulted from the pursuit of this plan exceed constitutional limits. We conclude that they do not.

The most stringent mathematical standard that has heretofore been imposed upon an apportionment plan for a state legislature by this Court was enunciated in *Swann* v. *Adams*, 385 U. S. 440 (1967), where a scheme having a total deviation of 26% was disapproved. In

[9] Appellees also contend that it is clear the State has abandoned its traditional adherence to political subdivision boundaries since it provided in the reapportionment statute that districts shall not change even though boundaries do as a result of annexation, for example. The short answer is that the General Assembly had the dual goal of maintaining such lines and providing for population equality. Reapportionment was only constitutionally required every 10 years between redistricting, and it was the Assembly's decision that if during the 10 years between redistricting one of its goals should conflict with the other, the one based on known population variances should prevail. Such a determination does not render constitutionally defective an otherwise valid plan.

that case, the State of Florida offered no evidence at the trial level to support the challenged variations with respect to either the House or Senate. *Id.*, at 446. The Court emphasized there that "the fact that a 10% or 15% variation from the norm as approved in one state has little bearing on the validity of a similar variation in another state." *Id.*, at 445. We therefore find the citations to numerous cases decided by state and lower federal courts to be of limited use in determining the constitutionality of Virginia's statute. The relatively minor variations present in the Virginia plan contrast sharply with the larger variations in state legislative reapportionment plans which have been struck down by previous decisions of this Court. See, *e. g., Reynolds* v. *Sims, supra; Swann* v. *Adams, supra;* and *Kilgarlin* v. *Hill,* 386 U. S. 120 (1967).

Neither courts nor legislatures are furnished any specialized calipers which enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula which establishes what range of percentage deviations are permissible, and what are not. The 16-odd percent maximum deviation which the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations which have been found invalid in the previous decisions of this Court. While this percentage may well approach tolerable limits, we do not believe it exceeds them. Virginia has not sacrified substantial equality to justifiable deviations.

The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members to the House of Delegates, is a rational one. It can reasonably be said, upon examina-

tion of the legislative plan, that it does in fact advance that policy. The population disparities which are permitted thereunder result in a maximum percentage deviation which we hold to be within tolerable constitutional limits. We therefore hold the General Assembly's plan for the reapportionment of the House of Delegates constitutional and reverse the District Court's conclusion to the contrary. We also affirm *Weinberg* v. *Prichard et al.*, No. 71–444, held pending this disposition.[10]

II

The General Assembly divided the State into 40 single-member senatorial districts. Under the plan, the City of Virginia Beach was added to the City of Norfolk and the entire area was divided into three single-member districts which the court below found conformed almost ideally, numerically, to the "one person, one vote" principle. But all naval personnel "homeported" at the U. S. Naval Station, Norfolk, about 36,700 persons, were assigned to the Fifth District because that is where they were counted on official census tracts.[11] It was undis-

[10] A companion case, *Weinberg* v. *Prichard et al.*, No. 71–444, was held pending disposition of these appeals. In it, appellant Weinberg challenges the order of the District Court insofar as it sustains the validity of the 22d and 23d districts established in the House of Delegates apportionment statute. He argues that in court-ordered reapportionment, this Court ought to exercise its supervisory power to require more equality than would be required from legislative reapportionment. He also contends that the method of computation of floterial district deviations utilized by the District Court was erroneous. Since the House of Delegates apportionment statute is constitutional, and since the deviation for the 23d district under appellant's method of computation is only 3.9%, substantially lower than the approximately 16% deviation today upheld, we affirm those portions of the judgment appealed from in No. 71–444.

[11] Such personnel were attached to ships "homeported" at Norfolk and they were enumerated in Census Tract 000999, a location encompassing a series of ship piers. They were counted that way in accordance with instructions from the Director of the Bureau of the

puted that only about 8,100 of such personnel lived aboard vessels assigned to the census tract within the Fifth District. The court had before it evidence that about 18,000 lived outside the Fifth District but within the Norfolk and Virginia Beach areas which, if true, indicated a malapportionment with respect to such personnel.[12] Lacking survey data sufficiently precise to permit the creation of three single-member districts more closely representing the actual population, the court corrected the disparities by establishing one multimember district comprised of the Fifth, Sixth, and Seventh Districts, encompassing the cities of Norfolk and Virginia Beach. *Howell* v. *Mahan*, *supra*.

Appellants charge that the District Court was not justified in overturning the districts established by the General Assembly since the Assembly validly used census tracts in apportioning the area and that the imposition by the court of a multimember district contravened the valid legislative policy in favor of single-member districts. We conclude that under the unusual, if not unique, cir-

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Census, George H. Brown. All ship commanders were directed to obtain an enumeration of all personnel assigned to their ships. Specifically his instructions provided that ship commanders were to: "Include all married personnel in the enumeration even though they may be home with their families on 1 April. Wives of personnel assigned to vessels will be instructed not to include their husbands when they complete their census forms."

Thus even though Navy personnel assigned to ships "homeported" at Norfolk might have lived outside the Fifth Senatorial District with their wives and families, for census purposes, they were assigned to that District.

The legislative use of this census enumeration to support a conclusion that all of the Navy personnel on a ship actually resided within the state senatorial district in which the ship was docked placed upon the census figures a weight which they were not intended to bear. The Navy itself used as a "rule of thumb" an estimate that 50% of such personnel occupied housing units on shore.

[12] The District Court found that the remaining 10,000 lived off the base but within the Fifth Senatorial District.

cumstances in this case the District Court did not err in declining to accord conclusive weight to the legislative reliance on census figures. That court justifiably found that with respect to the three single-member districts in question, the legislative plan resulted in both significant population disparities and the assignment of military personnel to vote in districts in which they admittedly did not reside. Since discriminatory treatment of military personnel in legislative reapportionment is constitutionally impermissible, *Davis* v. *Mann, supra,* at 691, we hold that the interim relief granted by the District Court as to the State Senate was within the bounds of the discretion confided to it.

Application of interim remedial techniques in voting rights cases has largely been left to the district courts. *Reynolds* v. *Sims, supra,* at 585. The courts are bound to apply equitable considerations and in *Reynolds* it was stated that "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws. . . ." *Ibid.*

The court below was faced with severe time pressures. The reapportionment plans were first forwarded to the Attorney General on March 1, 1971. By April 7, these three cases had been filed and consolidated. The first hearing was scheduled for May 24, but on May 7, the Attorney General interposed his objections pursuant to the Voting Rights Act. As a result, the May 24th hearing was largely devoted to arguing about the effect of such objections and after that hearing, the court directed the cases to be continued until June 15. It also postponed the primary elections which had been set for June 8 until September 14. The cases were finally heard on June 16, and the court's interlocutory order was entered on July 2, just two weeks prior to the revised July 16th filing deadline for primary candidates.

Prior to the time the court acted, this Court had handed down *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), recognizing that multimember districts were not *per se* violative of the Equal Protection Clause. The court conscientiously considered both the legislative policy and this Court's admonition in *Connor* v. *Johnson*, *supra*, that in fashioning apportionment remedies, the use of single-member districts is preferred. But it was confronted with plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against military personnel is constitutionally impermissible, *Davis* v. *Mann*, *supra*, at 691–692, and the fear that too much delay would have seriously disrupted the Fall 1971 elections. Facing as it did this singular combination of unique factors we cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multimember district.[13] We therefore affirm the order of that Court insofar as it dealt with the State Senate.

Affirmed in part, reversed in part.

MR. JUSTICE POWELL took no part in the consideration or decision in these cases.

[13] We note that the order appealed from is interlocutory and the lower court has retained jurisdiction. There is nothing in its order to prevent the Virginia General Assembly from enacting an apportionment plan for the Fifth, Sixth, and Seventh Districts which differs from that ordered by the court but is nonetheless consistent with constitutional requirements.

SUPREME COURT OF THE UNITED STATES

Nos. 71–364, 71–373, AND 71–444

Joan S. Mahan, Secretary, State Board of Elections, et al., Appellants,
71–364 *v.*
Henry E. Howell, Jr., et al.

City of Virginia Beach, Appellant,
71–373 *v.*
Henry E. Howell, Jr., et al.

Robert L. Weinberg, Appellant,
71–444 *v.*
Edgar A. Prichard et al.

On Appeals from the United States District Court for the Eastern District of Virginia.

[February 21, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I agree with the Court in No. 71–373, *City of Virginia Beach* v. *Howell*, that the joinder by the District Court of three senatorial districts in the Norfolk-Virginia Beach area to create one multimember senatorial district for the 1971 election was permissible under the special circumstances of this case. Cf. *Whitcomb* v. *Chavis*, 403 U. S. 124, 176–179 (1971) (DOUGLAS, J., concurring and dissenting); see *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966). I dissent, however, in No. 71–364, *Mahan* v. *Howell*, from the Court's action in setting aside the District Court's finding that the apportionment of the State House of Delegates violated the Equal Protection Clause of the Fourteenth Amendment.

The Court approves a legislative apportionment plan that is conceded to produce a total deviation of *at least*

16.4% from the constitutional ideal.[1] Of course, "the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State." *Swann* v. *Adams*, 385 U. S. 440, 445 (1967). "What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case." *Reynolds* v. *Sims*, 377 U. S. 533, 578 (1964). Since every reapportionment case presents as its factual predicate a unique combination of circumstances, decisions upholding or invalidating a legislative plan cannot normally have great precedential significance. *Abate* v. *Mundt*, 403 U. S. 182, 189 (1971) (BRENNAN, J., dissenting). But language in the Court's opinion today suggests that more may be at stake than the application of well-established principles to a novel set of facts. In my view, the problem in the case before us is in no sense one of first impression, but is squarely controlled by our prior decisions. See *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969); *Swann* v. *Adams*, 385 U. S. 440 (1967); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Davis* v. *Mann*, 377 U. S. 678 (1964); *Roman* v. *Sincock*, 377 U. S. 695 (1964). It is appropriate, therefore, to call to mind again the controlling principles and to show that, properly applied to the facts of the case before us, they preclude a reversal of the District Court's decision.

I

Virginia's recently amended Constitution provides that "members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly," and "[e]very electoral district shall be composed of con-

[1] The full extent of the deviation may, in fact, be substantially in excess of 16.4%, as appellees maintain and appellants seemingly concede. See pp. 3–5, *infra*.

tiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." Art. II, § 6. Pursuant to that requirement, the General Assembly in 1971 divided the Commonwealth into 52 legislative districts from which the 100 members of the House of Delegates were to be elected.

On the basis of 1970 census figures, which set the population of the Commonwealth at 4,648,494, each delegate should ideally represent 46,485 persons. While the legislature's plan does not disregard constitutional requirements to the flagrant extent of many earlier cases,[2] it does nevertheless demonstrate a systematic pattern of substantial deviation from the constitutional ideal. Under the 1971 plan more than 25% of the delegates would be elected from districts in which the population deviates from the ideal by more than 5%. Almost 60% of the delegates would represent districts which deviate by more than 3%. Four legislators would be elected from districts which are over- or under-represented by more than 8%. And the maximum deviation—the spread between the most over-represented and the most under-represented districts—would be at least 16.4%, and might be as high as 23.6%, depending on the method of calculation.

Assuming a maximum deviation of 16.4%, the legislature's plan is still significantly less representative than many plans previously struck down by state and lower federal courts.[3] Appellees maintain, however, that the

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[2] See, *e. g., Avery* v. *Midland County*, 390 U. S. 474 (1968); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Roman* v. *Sincock*, 377 U. S. 695 (1964).

[3] See, *e. g., Cummings* v. *Meskill*, 341 F. Supp. 139 (Conn. 1972) (maximum deviation for house, 7.83%, and for senate, 1.81%); *In re Legislative Districting of General Assembly*, — Iowa —, 193 N. W. 2d 784 (1972) (house, 3.8%, and senate, 3.2%); *Graves* v. *Barnes*, — F. Supp. — (WD Tex. 1972) (9.9%); *Troxler* v.

total deviation, properly computed, is in fact 23.6%—a figure closely approximating the 25.65% deviation which led us to invalidate the Senate plan in *Swann* v. *Adams*, *supra*, the 26.48% deviation which led us to invalidate the House plan in *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967), and the 24.78% deviation which led us to invalidate the House plan in *Whitcomb* v. *Chavis*, 403 U. S. 124, 161–163 (1971). Appellees arrive at the figure of 23.6% by taking into account the deviations in floterial districts, see appendix, at 81–83, and appellants seem to concede that 23.6% is an accurate indicator of the total deviation. See Brief for Appellant Commonwealth of Virginia, at 7.[4]

The District Court pointed out that the "range of deviation may exceed 16.4%," 330 F. Supp. 1138, 1139 n. 1 (ED Va. 1971), but it had no occasion to consider whether 23.6% was the more accurate figure because of its finding that "[u]nder either mode of calculation . . . the statewide range of deviation will not pass constitutional muster." *Ibid.* Although conceding that the District Court did not reject or disparage appellees' assertion of a 23.6% deviation, the Court nevertheless reaches the perplexing conclusion that we "confine our

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St. John the Baptist Parish Police Jury, 331 F. Supp. 222 (ED La. 1971) (6.2%); *In re Legislative Districting of General Assembly*, — Iowa —, 175 N. W. 2d 20 (1970) (house, 13%, and senate, 12.1%); *Driggers* v. *Gallion*, 308 F. Supp. 632 (MD Ala. 1969) (at least 10%); *Skolnick* v. *Illinois State Electoral Bd.*, 307 F. Supp. 691 (ND Ill. 1969) (house, 16.9%, and senate, 14.7%); *Long* v. *Docking*, 282 F. Supp. 256, 283 F. Supp. 539 (Kan. 1968) (16.6%).

[4] "The deviations from absolute equality of population arrived at by the redistricting of the House ranged from an under-representation of plus 9.6% to an over-representation of minus 6.8%, or a total variance of 16.4%. *As noted by the Court, however, the 42nd District, a floater shared by the cities of Chesapeake, Portsmouth and Virginia Beach would have as to that one instance increased the total variation to 23.6%.*" (Emphasis supplied.) See also Reply Brief for Appellant City of Virginia Beach, at 3–4.

consideration to the figures actually found by the court and used to support its holding of unconstitutionality"—16.4%. *Ante,* at p. 3, n. 6. But if the legislature's plan does, in fact, "pass constitutional muster" on the assumption of a 16.4% deviation, then it is surely fair to ask whether the plan would still be valid assuming a total deviation of 23.6%. The Court refuses either to confront the question directly or to render it moot by determining that the figure of 23.6% is irrelevant because improperly derived. Instead, it attempts to obscure the issue by contending that the Commonwealth and the City of Virginia Beach disputed appellees' assertion of a 23.6% total deviation. That contention is wholly incorrect. Neither in the answers filed in the District Court, nor in the briefs, nor at oral argument did the Commonwealth or the City of Virginia Beach quarrel with appellees' method of calculating the deviation in floterial districts. See n. 4, *supra.* The Court's refusal to consider the question can only mean that appellees have the option of reopening this litigation in the District Court in an attempt to persuade that court that the true measure of the deviation is 23.6% and that a deviation on this order is fatal to the Commonwealth's plan.

In my view, there is no need to prolong this litigation by resolution in the court below of an issue which this Court should, but inexplicably does not, decide. The District Court correctly held that deviations on the magnitude of even 16.4% are sufficient to invalidate the legislature's plan. And that court added—again correctly—that "[i]n reapportionment cases the burden is on the State to justify deviations from parity by 'legitimate considerations incident to the effectuation of a rational state policy.' *Reynolds* v. *Sims,* 377 U. S. 533, 579 (1964); see *Swann* v. *Adams,* 385 U. S. 440, 444 (1967). . The State has proved no governmental necessity for strictly adhering to political subdivision lines."

330 F. Supp., at 1140. Accordingly, the District Court promulgated its own apportionment plan which significantly reduced the extent of deviation.

Under the District Court's plan the maximum deviation would be 7.2%,[5] excluding one district which is geographically isolated from the mainland of the Commonwealth.[6] And even including that isolated district the maximum total deviation would not exceed 10.2%. But the substantial reduction in the maximum deviation does not in itself make clear the full measure of the improvement achieved by the District Court's plan. The number of delegates whose districts deviate from the norm by 3 or more percent would be almost cut in half, from 58 to 32. And of the 32 districts still exceeding the 3% mark, only one—the geographically isolated district—would exceed the mean by more than 3.7%. In short, while the District Court did not achieve its stated goal of "perfect mathematical division" because of the "multiplicity of delegates, the geography of the State and the diversity of population concentrations," 330 F. Supp., at 1147, its plan would still produce measurably greater equality of representation.

Appellants necessarily concede that the District Court's plan would reduce the inequality in population per district, but they defend the legislature's plan on the ground that "tolerance of political jurisdictional lines is justification for some deviation," Brief for Appellant Commonwealth of Virginia, at 24. They maintain that the

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[5] The deviation would be slightly in excess of 8% if floterial districts were weighted according to appellees' method of calculation. 330 F. Supp., at 1147 n. 9.

[6] The isolated district comprises Accomack and Northampton Counties. These counties, known as the Eastern Shore, are separated from the mainland of Virginia by Chesapeake Bay and the Atlantic Ocean. They are contiguous only to the State of Maryland. The district, the 46th, is over-represented by 6.5%.

legislature's plan achieved the highest degree of equality possible without fragmenting political subdivisions. The principal question presented for our decision is whether on the facts of this case an asserted state interest in preserving the integrity of county lines can justify the resulting substantial deviations from population equality.

II

The holdings of our prior decisions can be restated in two unequivocal propositions. First, the paramount goal of reapportionment must be the drawing of district lines so as to achieve precise equality in the population of each district.[7] "[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964); see also *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 531 (1969). The Constitution does not permit a State to relegate considerations of equality to secondary status and reserve as the primary goal of apportionment the service of some other state interest.

Second, it is open to the State, in the event that it should fail to achieve the goal of population equality, to attempt to justify its failure by demonstrating that precise equality could not be achieved without jeopardizing some critical governmental interest. The Equal Protection Clause does not exalt the principle of equal representation to the point of nullifying every competing interest of the State. But we have held firmly to

[7] *Reynolds* v. *Sims*, *supra*, at 567: "[T]he basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." See also *id.*, at 579.

the view that variations in weight accorded each vote can be approved only where the State meets its burden of presenting cogent reasons in explanation of the variations, and even then only where the variations are small. See, *e. g., Abate* v. *Mundt*, 403 U. S. 182 (1971); *Kirkpatrick* v. *Preisler, supra; Swann* v. *Adams, supra.*

The validity of these propositions and their applicability to the case before us are not at all diminished by the fact that *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller*, 394 U. S. 542 (1969)—two of the many cases in which the propositions were refined and applied—concerned the division of States into federal congressional districts rather than legislative reapportionment. Prior to today's decision we have never held that different constitutional *standards* are applicable to the two situations. True, there are significant differences between congressional districting and legislative apportionment, and we have repeatedly recognized those differences. In *Reynolds* v. *Sims*, for example, we termed "more than insubstantial" the argument that "a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained." *Id.*, at 580. See also *id.*, at 578; *Abate* v. *Mundt, supra.* But the recognition of these differences is hardly tantamount to the establishment of two distinct controlling standards. What our decisions have made clear is that certain state interests which are pertinent to legislative reapportionment can have no possible relevance to congressional districting. Thus, the need to preserve the integrity of political subdivisions as political subdivisions may in some instances justify small variations in the population of districts from which state legislators are elected. But that interest can hardly be asserted in justification of malapportioned congressional

districts. *Kirkpatrick* v. *Preisler, supra.* While the State may have a broader range of interests to which it can point in attempting to justify a failure to achieve precise equality in the context of legislative apportionment, it by no means follows that the State is subject to a lighter burden of proof or that the controlling constitutional standard is in any sense distinguishable.

Our concern in *Kirkpatrick* v. *Preisler* was with the constitutional requirement that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders,* 376 U. S. 1, 7–8 (1964). We rejected the State's argument that "there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard. . . . Since 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' *Wesberry* v. *Sanders, supra,* at 18, the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds* v. *Sims,* 377 U. S. 533, 577 (1964)." *Kirkpatrick* v. *Preisler, supra,* at 530–531. Moreover, we held, *id.,* at 532, that "[i]t was the burden of the State 'to present . . . acceptable reasons for the variations among the populations of the various . . . districts . . . .' *Swann* v. *Adams, supra,* at 443–444."

The principles that undergirded our decision in *Kirkpatrick* v. *Preisler* are the very principles that supported our decision in *Swann* v. *Adams,* a case involving the apportionment of a state legislature. The opinion in *Kirkpatrick* does not suggest that a different standard might be applicable to congressional districting. On the contrary, the "as nearly as is practicable" standard with which we were concerned is identical to the standard

that *Reynolds* v. *Sims* specifically made applicable to controversies over state legislative apportionment. See *Reynolds* v. *Sims*, *supra*, at 577. See also *Hadley* v. *Junior College District*, 397 U. S. 50, 56 (1970). And the holding in *Kirkpatrick* that the State must bear the burden of justifying deviations from population equality not only rested squarely and exclusively on our holding in *Swann* v. *Adams*, but even defined the test by quotation from *Swann*. See *Kirkpatrick* v. *Preisler*, *supra*, at 532.

In *Swann* v. *Adams* we held that variations in the population of legislative districts must be justified by the State by presentation of "acceptable reasons for the variations." *Id.*, at 443. And a comparison of the opinion for the Court in *Swann* with the views expressed by two Justices in dissent, see *Swann* v. *Adams*, *supra*, at 447–448 (Harlan, J., dissenting), decisively refutes any suggestion that unequal representation will be upheld so long as some rational basis for the discrimination can be found. A showing of necessity, not rationality, is what our decision in *Swann* requires.

If *Swann* does not establish the point with sufficient clarity, then surely our decision in *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967), where we elucidated and applied the principles of *Swann*, removes all doubt. There, the District Court had sustained the state apportionment plan on two grounds, one of which we termed a "burden of proof" ruling. The lower court held that "appellants had the burden not only of demonstrating the degree of variance from the equality principle but also of 'negat[ing] the existence of any state of facts which would sustain the constitutionality of the legislation.' 252 F. Supp. 404, 414." *Id.*, at 122. We squarely rejected that statement of the controlling legal standard, and held that under *Swann* v. *Adams*, "it is quite clear that un-

less satisfactorily justified by the court or by the evidence of record, population variances of the size and significance evident here [a total deviation of 26.48%] are sufficient to invalidate an apportionment plan." *Ibid.* We also rejected the District Court's second ground of decision: namely, that the deviations were amply justified by the State's attempt, wherever possible, to respect county boundaries. Significantly, the opinion stated that "[w]e are doubtful . . . that the deviations evident here are the kind of 'minor' variations which *Reynolds* v. *Sims* indicated might be justified by local policies counseling the maintenance of established political subdivisions in apportionment plans. 377 U. S. 533, 578–579. But we need not reach that constitutional question, for we are not convinced that the announced policy of the State of Texas *necessitated* the range of deviations between legislative districts which is evident here." *Id.*, at 123 (emphasis supplied).

III

I would affirm the District Court's decision because on this record the Commonwealth of Virginia failed—just as the State of Florida failed in *Swann* v. *Adams* and the State of Texas failed in *Kilgarlin* v. *Hill*—to justify substantial variations in the population of the districts from which members of the House of Delegates are elected. The panel which heard the case below consisted of four judges, all from Virginia, and I share their unanimous view that the Commonwealth failed to prove that the variations were justified by a need to insure representation of political subdivisions or a need to respect county boundaries in the drawing of district lines.

If variations in the population of legislative districts are to be upheld, the Court must determine, before turning to the justifications which are asserted in defense of

the variations, that they are "free from any taint of arbitrariness or discrimination." *Ante*, at 10, quoting from *Roman* v. *Sincock*, 377 U. S. 695, 710 (1964). Appellees alleged before the District Court that the legislature's reapportionment plan did indeed discriminate against one region of the State—the Northern Virginia suburbs of Washington, D. C. Each House seat in Northern Virginia would be under-represented by an average of 4.3% under the 1971 plan, and several would be under-represented by as much as 6.3%. In view of what it termed the "pervasive under-representation in districts in Northern Virginia," 330 F. Supp., at 1146, the District Court ordered the transfer of one delegate out of the systematically over-represented Tidewater region and into Northern Virginia.

In *Abate* v. *Mundt*, *supra*, at 185–186, we pointed out that we have

> "never suggested that certain geographic areas or political interests are entitled to disproportionate representation. . . . Accordingly, we have underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests, or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors, see *Hadley* v. *Junior College District*, 397 U. S. 50, 57–58 (1970)."

The District Court found as a fact that the 1971 plan did include a "built-in bias tending to favor [a] particular geographic area." Conveniently, the Court discerns no need even to acknowledge this critical finding of fact, and sets it aside without explanation. We have no basis for concluding that the finding is clearly erroneous, and that finding requires an affirmance of the District Court's decision without regard to the Common-

wealth's asserted justifications for the inequalities in district population.

But even assuming that the Commonwealth's plan can be considered free of any "taint of arbitrariness or discrimination," appellants have failed to meet their burden of justifying the inequalities. They insist that the legislature has followed a consistent practice of drawing district lines in conformity with county boundaries. But a showing that a State has followed such a practice is still a long step from the necessary showing that the State *must* follow that practice. Neither in the State Constitution nor in any Act of the Assembly has Virginia explicitly indicated any interest in preserving the integrity of county lines or in providing representation of political subdivisions as political subdivisions. Cf. *Reynolds* v. *Sims, supra,* at 580–581. On the contrary, the Virginia Constitution establishes a single standard for both legislative apportionment and congressional districting, and that standard requires only that lines be drawn so as to insure, "as nearly as is practicable," representation in proportion to population.[8] And the origins of the constitutional provision make clear that equality in district population, not the representation of political subdivisions, is the Commonwealth's pre-eminent goal.[9]

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[8] Cf., *e. g.*, the apportionment provision in the Indiana Constitution. *Whitcomb* v. *Chavis,* 403 U. S. 124, 136 n. 14 (1971):

"A Senatorial or Representative district, where more than one county shall constitute a district, shall be composed of contiguous counties; *and no county, for Senatorial apportionment, shall ever be divided.*" Art. 4, § 6 (emphasis supplied).

[9] Prior to its amendment in 1971, the Constitution provided that "[t]he General Assembly shall by law apportion the State into districts, corresponding with the number of representatives to which it may be entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of con-

Moreover, in asserting its interest in preserving the integrity of county boundaries, the Commonwealth offers nothing more than vague references to "local legislation," without describing such legislation with precision, without indicating whether such legislation amounts to a significant proportion of the legislature's business, and without demonstrating that the District Court's plan would materially affect the treatment of such legislation.[10]

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tiguous and compact territory containing as nearly as practicable, an equal number of inhabitants." § 55. At the same time, the Constitution provided, with respect to legislative apportionment, only that "[t]he present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter." § 43. Plainly, the adoption in 1971 of a provision, Art. II, § 6, which sets a single standard to govern legislative districting and congressional apportionment, indicates that in the minds of the draftsmen the same considerations should apply in the two situations.

[10] Appellants maintain that

"local governments carry out much of the various responsibilities of State government as well as having direct concern in the enactment of numerous local legislative enactments. This alone justifies Virginia's tradition of adherence to political jurisdictions. Moreover, the revised Virginia Constitution now allows for the first time special or local legislation for counties as well as for cities. Revised Constitution of Virginia, Article VII, Section 2. Those provisions now permit counties the constitutional flexibility formerly afforded only to cities in providing services for their citizens." Brief for Appellant Commonwealth of Virginia, at 27.

The constitutional provision to which appellants refer declares that "[t]he General Assembly may also provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment as the General Assembly may determine . . . ." It should be noted, however, that this provision permits the delegation of broad powers to local governments. It does not speak to the issue—obviously of great concern to the residents of each political subdivision—of the manner in which that delegated power will be exercised by the local government.

The Court assumes that county representation is an important goal of Virginia's reapportionment plan, *ante*, at pp. 10–12, and appellants suggest that the plan can be justified, at least in part, by the effort "to give an independent voice to the cities and counties [the legislature] daily governs." Brief for Appellant Commonwealth of Virginia, at 33. If county representation is indeed the Commonwealth's goal, then the apportionment plan adopted in 1971 itself falls far short of that objective. Appellants describe the problem in the following terms:

> "Under the Court's plan, a situation could arise where the 1602 citizens of Wythe County, Virginia, who were placed in the Sixth Legislative District are opposed to local legislation pending in the General Assembly for their county. They must voice such opposition to the delegates representing 91,620 other persons in the Sixth Legislative District composed of the Counties of Carroll, Floyd and Montgomery and the City of Radford, rather than oppose only their 20,537 fellow citizens of Wythe County." Brief for Appellant Commonwealth of Virginia, at 27.

That argument assumes that some significant number of issues will have an impact squarely on Wythe County, while having no impact, or a differing impact, on the surrounding areas. For on issues affecting the entire region or the Commonwealth as a whole—presumably the vast majority of issues—the critical concern is not that each vote in Wythe County be cast in a single district, but that each vote cast be precisely equal in weight to votes in every other part of the State. And the argument also assumes that the issues affecting only one county are of predominant concern to the voters. Under a representative form of government the voters participate indirectly through the election of delegates. It should be obvious that as a voter's

concern with regional or statewide issues increases relative to his interest in county issues, the significance of voting outside the county will correspondingly diminish.

But even if a substantial number of issues do have an impact primarily on a single county, and even if those issues are of deep concern to the voters, it still does not follow that the legislature's apportionment plan is a rational attempt to serve an important state interest. The plan would by no means provide, even in the legislature's own terms, effective representation for each county. Thus, the fourth legislative district, which would elect one delegate under the 1971 plan, consists of Wythe, Grayson, and Bland Counties along with the City of Galax. Yet Wythe County alone, according to appellants' figures, comprises 22,139 of the 49,279 persons resident in the district. Since Wythe County makes up almost one-half of the population of the fourth district, the district's delegate is likely to champion Wythe County's cause should an issue arise that pits its interest against the interests of Grayson or Bland County or the City of Galax.

In short, the best that can be said of appellants' efforts to secure county representation is that the plan can be effective only with respect to some unspecified but in all likelihood small number of issues which affect a single county and which are overwhelmingly important to the voters of that county; and even then it provides effective representation only where the affected county represents a large enough percentage of the voters in the district to have a significant impact on the election of the delegate.[11] But even if county representation were, in

[11] To realize the goal of county representation it would, of course, be necessary to accord each county at least one representative. In the case of Virginia such a plan could not be implemented without generating vast and unconstitutional disparities in the population of the districts. And such a plan clearly could not be justified by

fact, a strong and legitimate goal of the Commonwealth, and even if the 1971 plan did represent a rational effort to serve that goal, it is still not clear that the legislature's plan should be upheld. The plan prepared by the District Court would achieve a much higher degree of equality in district population, and it would accomplish that salutary goal with minimal disruption of the legislature's effort to avoid fragmenting counties. Of the 134 political subdivision in the Commonwealth, only 12 would be divided by the District Court's plan. More significant, the number of persons resident in voting districts which would be cut out of one county or city and shifted to another is 64,738, out of the total state population of 4,648,494. Thus, even making each of the logical and empirical assumptions implicit in the view that violating county lines would effectively disenfranchise certain persons on certain local issues, the number of persons affected would still be less than 1½% of the total state population.

IV

On this record—without any showing of the specific need for county representation or a showing of how such representation can be meaningfully provided to small counties whose votes would be submerged in a multi-county district—I see no basis whatsoever for upholding the Assembly's 1971 plan and the resulting substantial variations in district population. Accordingly, I would affirm the judgment of the District Court holding the plan invalid under the Equal Protection Clause of the Fourteenth Amendment.

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invoking the so-called "federal analogy." See *Reynolds* v. *Sims*, *supra*, at 571–577.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-373

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., et al.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

STANFORD E. PARRIS, et al.,

Appellees.

CITY OF VIRGINIA BEACH,

Appellant,

v.

CLIVE L. DUVAL, II, et al.,

Appellees.

PETITION FOR REHEARING

Now comes the appellant, City of Virginia Beach, and petitions this Court for a rehearing, pursuant to Rule 58 of the Rules of the Supreme Court, of that portion of the Court's decision which affirmed the order of the United States District Court for the Eastern

District of Virginia relating to the reapportionment of the Virginia Senate.

Introduction

In its interlocutory order dated July 2, 1971, the District Court declared unconstitutional the General Assembly's reapportionment plans for the Virginia House of Delegates and Senate. This Court, in an opinion by Mr. Justice Rehnquist dated February 21, 1973*, held the General Assembly's House of Delegates plan constitutional, reversing the District Court's conclusion to the contrary. No rehearing is requested as to this aspect of the case.

In the opinion this Court also affirmed the District Court's holding that the Virginia reapportionment plan for the Senate was unconstitutional and approved the District Court's consolidation of the Fifth, Sixth and Seventh Senatorial Districts of Virginia into one large multimember district. This

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* Mahan, Secretary, State Board of Elections v. Howell, together with City of Virginia Beach v. Howell and Weinberg v. Prichard.

Court found that the District Court had not abused its discretion in consolidating these districts because the lower court was "confronted with plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against military personnel is constitutionally impermissible, Davis v. Mann, supra, at 691-692, and the fear that too much delay would have seriously disrupted the Fall 1971 elections." (Slip Opinion at 17). A rehearing is requested as to this portion of the Court's February 21, 1973, decision.

Statement of Grounds for Rehearing

On the Senate side of this appeal the issue was simply whether the District Court had acted properly on the basis of the unique circumstances in Norfolk where large numbers of military personnel are stationed. The facts, not legal precedent, were largely dispositive of the issue and for this reason the City of Virginia Beach now seeks a rehearing. The Court's opinion suggests that the decision to affirm the District Court's order was made under a misconception of the true situa-

tion. The opinion states:

> "Under the [Senate] plan, the City of Virginia Beach was added to the City of Norfolk and the entire area was divided into three single-member districts which the court below found conformed almost ideally, numerically, to the 'one person, one vote' principle." (Slip Opinion at 14) (emphasis added).

This statement is inaccurate. As stated in the opening briefs of the City of Virginia Beach (at 7, 30) and the Commonwealth of Virginia (at 7) and as appears in the Joint Appendix (at 56), only 40,195 of its 172,106 citizens, not the entire area of Virginia Beach, were added to Norfolk. These 40,195 were to vote with 75,764 Norfolk citizens in the Seventh Senatorial District under the General Assembly's plan and the remaining 131,911 were to vote either in the Eighth Senatorial District (population 116,528, all citizens of Virginia Beach) or in the Fourteenth Senatorial District (population 116,084, comprising 15,383 citizens of Virginia Beach, 7,111 citizens of Nansemond County and 89,580 citizens of the City of Chesapeake).

The consolidation of the Fifth, Sixth and Seventh Senatorial Districts by the District Court

results in a much larger dilution of the Virginia Beach senate vote than would be the case if the facts were as stated in this Court's opinion. The 40,195 citizens of the City of Virginia Beach who would have voted for one senator with 75,764 citizens of Norfolk must now vote for three senators with the entire 307,951 population of Norfolk. Prior to the consolidation they were outnumbered by Norfolk citizens approximately 2 to 1; after consolidation they are outnumbered by approximately 8 to 1 and have virtually no voice in the election of senators from the consolidated district.

This Court's error of fact takes on added significance on page 15 of the Slip Opinion where it is stated:

> "The court had before it evidence that about 18,000 lived outside the Fifth District but within the Norfolk and Virginia Beach areas which, if true, indicated a malapportionment with respect to such personnel."

The evidence, however, was somewhat different. A zip code sample of 544 sailors conducted by the Navy (App. 138-40) did indicate that approximately half of

the naval personnel assigned for census purposes to Census Tract 000999 lived outside the Fifth Senatorial District. But there was no evidence that all who lived outside the Fifth Senatorial District lived within the Cities of Norfolk and Virginia Beach, much less in the Fifth, Sixth and Seventh Districts. On the contrary, the Navy's survey indicates that almost half did not. As stated in a footnote to the Commonwealth's opening brief (at 36):

> "Even assuming a degree of accuracy in Reed's survey, his results show that of the 21,600 who were enumerated as home-ported in the Fifth but lived outside such district, 48%, or over 9,500 persons, maintained residences outside the Fifth, Sixth or even the Seventh Senatorial Districts."

Thus, the District Court's consolidation of the three single member senatorial districts only partially solved the problem created by the large numbers of naval personnel stationed in Norfolk. Almost half of the approximately 18,000 sailors who do not live in the Fifth District do not live in the Sixth or Seventh either. According to their zip codes, these sailors live in portions of Virginia Beach outside the newly

consolidated district and in other areas of Tidewater. These other areas, including the City of Virginia Beach, remain underrepresented -- under the consolidation Norfolk has retained all the political influence represented by the naval personnel stationed there.

Conclusion

This Court's affirmance of the District Court's consolidation of the three senatorial districts is based on its belief that "the court corrected the disparities by establishing one multimember district ..." (Slip Opinion at 15). But this was not the case. Moreover, the consolidation seriously reduces the voice of 40,195 Virginia Beach citizens in the election of a senator. The City of Virginia Beach respectfully asks that the Court reconsider its partial affirmance of the District Court's order on the basis of the correct facts.

Certificate

I hereby certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

Respectfully submitted,

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Dated: March 16, 1973

SUPREME COURT OF THE UNITED STATES

Nos. 71–364 AND 71–373

John S. Mahan, Secretary, State Board of Elections, et al., Appellants,
71–364 *v.*
Henry E. Howell, Jr., et al.

City of Virginia Beach, Appellant,
71–373 *v.*
Henry E. Howell, Jr., et al.

On Petition for Rehearing.

[April 2, 1973]

Treating the petition for rehearing in #71-373 as a motion to modify the Court's opinion, the following order is hereby entered:

The motion of the ~~petitioner~~ appellant, City of Virginia Beach, to modify this Court's opinion is hereby granted. The first paragraph in Part II of the opinion is amended by adding "a portion of" after the phrase "Under the plan," in the second sentence thereof, and by striking the phrase "encompassing the cities of Norfolk and Virginia Beach" in the last sentence of the paragraph, substituting therefor the following phrase: "encompassing the City of Norfolk and a portion of Virginia Beach."

MR. JUSTICE POWELL took no part in the consideration or decision of this order.